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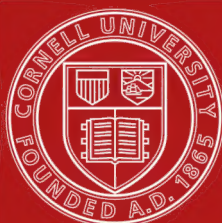
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The law of real property(based on Minor'



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THE LAW
OF
REAL PROPERTY

(BASED ON MINOR'S INSTITUTES)

BY
RALEIGH COLSTON MINOR, M.A., B.L.
PROFESSOR OF LAW IN THE UNIVERSITY OF VIRGINIA

AND
JOHN WURTS, M.A., M.L.
PROFESSOR OF LAW IN YALE UNIVERSITY

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PREFACE.

CREDIT must be given to Professor Raleigh Colston Minor for everything in this book except the American modifications of the common law, and those I must assume responsibility for.

Professor Minor is not to be held in any degree responsible for the scope of the book. In my own work of teaching, I have long felt the need of a text-book on Real Property which did not undertake to give the laws of all the States, and Professor Minor generously consented to allow his two-volume work on the subject, published in 1908, to be used as a basis for such a book.

My plan has been to produce a book which would set forth the common law of Real Property, showing wherein it has been repealed in this country as contrary to our fundamental law or the spirit of our institutions, and to show such statutory changes as are of general importance. In carrying out this plan, therefore, I have omitted several special topics dependent on local statutes, a treatment of which might be looked for in a book of general reference on Real Property but which would have deprived this book in a large measure of its *raison d'être*.

JOHN WURTS.

NEW HAVEN, CONN., January 5, 1910.

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THE LAW OF REAL PROPERTY

DIVISION I.

THE TENURES OF REAL PROPERTY.

CHAPTER I.

THE TENURES OF REAL PROPERTY.

- § 1. Modern Rules Derived from Feudal Principles.
- 2. Origin of the Feudal System.
- 3. Introduction of Feuds into England.
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- 14. Conversion of Military into Socage Tenures.
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§ 1. **Modern Rules Derived from Feudal Principles.** Many of the legal principles controlling real property to-day may be traced to the ancient constitution of feuds that prevailed in England, and indeed on the continent also, about the time of the Norman Conquest and afterwards. Without some acquaintance with the fundamental conceptions upon which the feudal system was founded and with the incidents of that system, it would be impossible to grasp fully some of the most important of the rules that govern the use and transfer of land.

§ 2. **Origin of the Feudal System.** The constitution of feuds derived its origin from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who brought it from their own original countries, and continued it in their respective colonies as the most likely means to secure their own acquisitions. To that end large districts were

allotted by the conquering general to the superior officers of the army, and by them dealt out in smaller parcels or allotments to the inferior officers and most deserving soldiers. Those allotments were called *foeda*, feuds, fiefs, or fees; which last appellation, in the northern languages, signifies a conditional stipend or reward, the condition annexed being that the possessor should do service faithfully to him by whom they were given, for which purpose he took the *juramentum fidelitatis*, or oath of fealty; and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.¹

Allotments thus acquired naturally engaged such as accepted them to defend them, and, as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers, as well as receivers, were mutually bound to defend each others' possessions. But as that could not be done effectually in a tumultuous, irregular way, government, and to that purpose subordination, was necessary. Thus the feudal connection was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's several property, but also in defence of the whole, and of every part, of their newly acquired domain; the produce of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquest.²

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valor, alarmed all the princes of Europe, that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary, upon the principle of self-protection, to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly allodial (that is, wholly independent, and held of no superior at all), now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations of military duty. And thus, in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world; which alteration of landed prop-

¹ 2 Min. Insts. 62.

² 2 Min. Insts. 62, 63; 2 Bl. Com. 45 et seq. See, also, Robertson's Charles V., Intro.; Montesq. Sp. L., B. xxx, xxxi; Hallam, Mid. Ages, c. II; 1 Spence, Eq. Jur. 28 to 103.

erty, in so very material a point, necessarily drew after it an alteration of laws and customs, so that the feudal laws, in respect to lands, soon drove out the Roman, which had hitherto so universally obtained, and now became for several centuries measurably lost and forgotten.³

§ 3. **Introduction of Feuds into England.** The feudal policy, which had thus been by degrees established over all the continent of Europe, seems not to have been received in England, at least not universally, and as a part of the national constitution, till the reign of William the Norman. Not that traces are wanting of something similar amongst the Saxons, but not so extensive, nor attended with the rigor that was afterwards imported by the Normans, perhaps because the Saxons were settled in England fully two centuries before feuds arrived at their full vigor and maturity on the continent.⁴

The introduction of the feudal tenures into England by King William does not seem to have been effected immediately after the Conquest, nor by the mere arbitrary power of the conqueror, so much as by his address, and by adroitly availing himself of the peculiar situation of his Saxon subjects, so as to procure the assent of the common council of the realm to the innovation.⁵

After the fatal battle of Hastings (A. D. 1066), he had of course rewarded his Norman followers with as large donations of land as were at his disposal, which, considering the immense slaughter of English nobility in the battle, must have been great. The fruitless insurrections which followed, and the numerous forfeitures occurring therefrom, still further increased his ability to attach the Norman chiefs to his victorious standard. It is probable, therefore, that within a very few years after his accession to the crown of England, no inconsiderable portion of the landed estates of the kingdom were in the possession of Norman proprietors, who, of course, by their own choice, and as the result of a very natural policy on the part of the king, held according to that system of feudal military subordination to which both they and he had been accustomed in Normandy.⁶

The consequence was that the same instinct of self-preservation, which led to the adoption of the feudal policy on the part of the several states of continental Europe, operated to constrain the great body of the Saxon thanes to consent ultimately to exchange their comparatively free, if not allodial, landholding for the mili-

³ 2 Min. Insts. 63; 2 Bl. Com. 47; Hallam, Mid. Ages, c. II; 1 Spence, Eq. Jur. 28 et seq.

⁴ 2 Min. Insts. 63.

⁵ 2 Min. Insts. 63.

⁶ 2 Min. Insts. 64.

tary tenures of the Normans. A feudal lord and his vassals, connected by the mutual obligation of protection and service, acted in vigorous concert, and, so far as the feudal circle was concerned, made amends for the feeble administration of the public magistrate. By the united force of this martial combination, injuries offered to any of its members were pretty sure to be avenged, and retorted with interest. The allodial proprietors, on the other hand, were in some measure aliens and outlaws in the midst of society, and, being thus exposed without any adequate legal protection, were fain to take shelter within the feudal association, and, rendering their lands to the king, were content to receive them back upon the terms of fealty and homage, preferring the security of vassals to the unprotected dignity of freemen.⁷

Thus it was that William found it no very difficult task to prevail upon an assemblage of his nobility, probably about A. D. 1086, to consent formally to introduce the feudal tenures by law, in consequence of which it became a necessary principle (though in reality a mere fiction) of English tenures "that the king is the universal lord, and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, and to be held upon feudal services."⁸

By this step, indeed, our English ancestors probably designed nothing more than a system of military defence; but the Norman interpreters, skilled in all the niceties of the feudal constitution, gave a very different construction to the proceeding, introducing upon it not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and incidents, such hardships and services, as were never known to other nations, as if the English had in fact, as well as theory, owed everything to the bounty of their sovereign lord.⁹

§ 4. *Nature of the Feudal Relation.* The retainer to whom the use of the land was granted in return for feudal services was said to hold the land under or of his lord, becoming his tenant (*teneo*, to hold) or vassal, and the relation thus established between lord and vassal was called tenure; while the thing so holden was styled a tenement.¹⁰

⁷ 2 Min. Insts. 64.

⁸ 2 Min. Insts. 64; 2 Bl. Com. 48 et seq.

⁹ 2 Min. Insts. 64, 65; 2 Bl. Com. 48 et seq.; 1 Th. Co. Lit. 244. n. (3); Mr. Hargrave's note, continued and enlarged upon by Mr. Butler, *Id.* 913. App'x; Sullivan Lects. 254, Lect. 27; 1 Reeves, *Hist. Eng. Law*, 9; 1 Hume's *England*, App'x I. and II.; Hallam, *Med. Ages*, c. VIII; Anglo-Sax. Chron. A. D. 1086.

¹⁰ 2 Min. Insts. 68; 2 Bl. Com. 53-60; 1 Washburn, *Real Prop.* 18, 19.

Such tenants as held immediately under the king were called tenants in capite (or in chief), whilst the king himself was called lord paramount (Fr. paramont, above, from par or per, intensive, and amont, above). If the tenants in capite let out their lands to subordinate tenants, though they still continued tenants to the king, they were lords to the undertenants, who might themselves become lords to tenants still lower in the scale. These intermediate lords received the appellation mesne lords, or mesnes, and the undertenants, at least those lowest in the scale, were known as tenants paravail (Fr. par, intensive, and aval lowest).¹¹

A feud, fief, or fee was conferred upon a vassal by means of a form of conveyance called "feoffment"; and the ceremony by which he was admitted to its actual enjoyment and possession was known as an "investiture," later taking the name "livery of seisin."¹² This consisted of an open and notorious, though symbolical, delivery of the possession of the land in the presence of other vassals; this, in the absence of any general acquaintance with reading and writing, being relied upon as affording the best available evidence of title.¹³

The relationship of lord and vassal implied on the lord's part the duty of protecting the vassal in the enjoyment of his feud, and of supplying him with a new one of equal value, if deprived of the first by paramount title (the latter being the origin of the doctrine of ancient warranty).¹⁴

Upon the vassal's part, the relationship implied fealty (i. e. an oath of fidelity) and homage (in case of hereditary feuds), which consisted in kneeling in the presence of his fellows and professing that "he did become the lord's man (devenio vester homo) from that day forth, of life and limb and earthly honor."¹⁵

According to the nature of the services to be rendered the feud was either a proper feud or an improper feud. If a "proper feud," these services were of a military character, as to serve the lord in his public or private wars, and (originally) were of an uncertain duration.¹⁶

At first "proper feuds" were the only ones known to the law, but as civilization advanced, and it was discovered that "peace

¹¹ 2 Min. Insts. 68.

¹² 2 Min. Insts. 65; 1 Washburn, Real Prop. 19. For a fuller description of livery of seisin, see post, 132 et seq.

¹³ 2 Bl. Com. 53.

¹⁴ 2 Min. Insts. 65; 2 Bl. Com. 57; 1 Washburn, Real Prop. 20. The doctrine of ancient warranty is explained, post, § 897 et seq.

¹⁵ 2 Min. Insts. 66; 2 Bl. Com. 45, note (3), 53, 54; 1 Th. Co. Lit. 253, note (c).

¹⁶ 1 Washburn, Real Prop. 19; Wright, Ten. 5, 27.

hath her victories, no less renowned than war," there arose a class of feuds called "improper feuds," in which services of a peaceful sort, such as the cultivation of the lord's land, the commutation of military service in agricultural labor or products, money, etc., were substituted in the place of the warlike services at first demanded.¹⁷

It will be seen that, in time of war, the feudal system gave the king directly or indirectly the power to call out the full military strength of the kingdom, the only limitation being found in the period during which he could demand his subjects' services, the amount of such service to be required of the vassal in any year being generally limited by the terms of the donation.

Subject to such restrictions, the king might call upon his tenants in capite to aid him in his wars. They must summon their immediate vassals, who in turn must summon theirs, until finally the units of the system—the lowest tenants in the series (tenants paravail)—be reached.

It was this ability to mobilize rapidly a fighting force, inherent in the feudal system, that gave it vitality and popularity. As the services gradually ceased to be of a military character, its usefulness was impaired, and it began to sink to its decay.

While in its vigor, however, this system of military defense, in default of a better, could be regarded by the courts no otherwise than as sacred, and indeed for centuries no agreements nor transactions tending to impair its efficiency were favored.

Hence it became an established feudal rule that a tenant could not, without the lord's assent, assign nor dispose of his feud to a stranger, so as to make him responsible to the lord for the feudal services, since the reason for conferring the feud was the personal capacity of the feudatory to render the services—a capacity which a stranger to the lord might not possess or might be unwilling to exercise in the lord's behalf. For analogous reasons, the lord could not transfer nor assign his seignory or duty of protection without the vassal's assent.¹⁸

It is to be observed that the feudal prohibition upon the tenant's alienation of his fief or feud applied to dispositions thereof by will with equal force and reason as to his alienation to a stranger *inter vivos*. Hence at common law there could be no such thing as a valid will of lands (except by the special custom of particular places, as in the "gavelkind" tenure), nor was there a statute permitting land to be devised until 32 Hen. VIII, c. 5.¹⁹

¹⁷ 2 Min. Insts. 67; 2 Bl. Com. 58; 1 Washburn, Real Prop. 19.

¹⁸ 2 Min. Insts. 67; 2 Bl. Com. 57. The consent of a vassal to the transfer of the seignory or overlordship was called an *attornment*.

¹⁹ 2 Min. Insts. 997, 998; 2 Bl. Com. 84; 1 Washburn, Real Prop. 32; post, §§ 6, 1003.

§ 5. **Same — Subinfeudation — Statute of Quia Emptores.** While, as shown in the preceding section, the vassal could not transfer his feud to a stranger, so as to shift upon him (and relieve himself of) the duty to render to the lord the services agreed upon, without the lord's assent (for which the latter gradually came to charge a considerable sum known as a "fine for alienation"), yet the vassal might assign the land to a stranger, to be held under the alienor by feudal services; the vassal or alienor being still responsible to the lord for the services he had agreed to render. This proceeding was termed subinfeudation (as opposed to alienation), and was freely allowed and much practiced in the earlier feudal times, down to the reign of Edward I.²⁰

In the year 18 Edw. I (A. D. 1289) the Parliament passed the statute "*quia emptores terrarum*," so called from its leading words. This statute was of great importance in shaping and developing the English law of real property. It prohibited subinfeudation, and enacted that a grantee of lands in fee simple should thenceforth hold immediately of the superior lord, by the same services whereby the grantor had formerly held, and not of the grantor. But the statute did not apply to the king's tenants in capite.²¹

This statute, while abolishing the right to subenfeoff, bestowed the far more important right of transferring the fee without consulting the lord's wishes, thus doing away with the odious and onerous "fines for alienation," and conferring upon the fee simple owner the complete *jus disponendi*, at least with respect to transfers *inter vivos*.²²

§ 6. **The Several Classes of Feudal Tenures.** In feudal law the tenure denoted not only the actual holding of land under or of another, but also the terms or conditions upon which he held. These were prescribed at the time of the donation of the feud, except in the case of a purely military or "proper" feud, in which case the conditions or services were implied by law.²³

²⁰ 2 Min. Insts. 637; 1 Pollock & Maitland, Hist. Eng. Law, 310; Digby, Hist. Real Prop. 156.

²¹ 2 Min. Insts. 637; 2 Bl. Com. 72, 289; 1 Washburn, Real Prop. 31.

²² 2 Min. Insts. 45, 637; 2 Bl. Com. 72; 1 Washburn, Real Prop. 31, 32.

²³ 1 Washburn, Real Prop. 22. Mr. Washburn thus describes the usual division and occupation of feudal manors: "The lord reserved to himself a demesne contiguous to his castle sufficient for the purposes of his house, his cattle, etc. The remainder was divided into four parts. Upon one of these was settled a number of military tenants sufficient to do that part of the service which was due to his superior lord. Another was for the use of his socage tenants, who ploughed his lands or returned to him the prescribed quantity of corn, cattle, etc. One part was for the lord's villeins, who performed the servile offices upon the manor of carrying out manure, building fences, etc., at the pleasure of the lord. The remaining part was

The feudal tenures were classified, according to the dignity of the service rendered, into free and base tenures; and, according to the amount of the service, into certain and uncertain.²⁴

Tenure in chivalry or knight-service was a free tenure, the military service incident to which was uncertain in amount; the condition being to follow the lord in his wars for such period as he should demand, not to exceed generally forty days in each year. This was originally regarded as the most honorable of all the tenures, and was a "proper" feud.²⁵

But as, with the progress of civilization, warlike instincts yielded to the arts of peace, it came to be regarded as entirely becoming the dignity of a freeman to exchange for the uncertain military service the condition of paying to the lord a certain sum of money or a certain quantity of corn, cattle, etc., or performing a certain amount of labor such as plowing the lord's lands. These were called socage tenures (Anglo-Saxon, soc, privilege)—or tenures in free and common socage—and were characterized by services free and certain in amount, and yet not military.²⁶

The base services were such as a freeman might not perform without more or less sacrifice of dignity and honor, and were in the main performable only by peasants and serfs. If the service was not only base, but also uncertain or unlimited in amount, the tenure was that of pure villeinage, which in few essential respects differed from slavery. The villein was obliged to do whatever was demanded of him.²⁷

If the service, though base, was certain in amount, the tenure was denominated villein-socage, and at a later period the tenure in ancient demesne.²⁸

These were the four most prominent forms of tenure, though there were in use at different times and places in England various

reserved as waste land, out of which the tenants of the manor supplied themselves with wood, etc., for their fires, fences and repairing their buildings, and with pasturage of their cattle upon what were called commons. * * * Each of these manors had a domestic court of its own, made up of the several vassals of the lord, who were freeholders and were called the *pares curiæ*. These had important parts to perform—among them, after feuds became alienable, the duty of witnessing the ceremony of homage, investiture and the like, by which lands were transferred." 1 Washburn, Real Prop. 22, 23.

²⁴ 2 Min. Insts. 69.

²⁵ 2 Min. Insts. 71; 2 Bl. Com. 61 et seq.; 1 Stephen, Com. 176, 177.

²⁶ 2 Min. Insts. 70; 2 Bl. Com. 60 et seq., 79 et seq.; 1 Stephen, Com. 193; 1 Washburn, Real Prop. 25; Burr. Law Dict. Socage.

²⁷ 2 Min. Insts. 70; 2 Bl. Com. 61, 62. This subsequently became the copyhold tenure. 2 Min. Insts. 77.

²⁸ 2 Min. Insts. 70, 79; 2 Bl. Com. 62, 98, 99.

modifications of these, some of which are briefly described in the appended foot-note.²⁹

§ 7. **Incidents of the Feudal Tenures—Enumeration.** Originally the relation of lord and vassal was in large measure that of protector and dependent, partaking somewhat of a patriarchal character. But it was also a political and military institution. It is necessary to hark back to these original conceptions if we would understand the incidents that gradually attached themselves to the system, finally becoming so burdensome as to cause its overthrow.

These incidents were not foreseen by the English people when they admitted the Norman military tenures. They appear to have supposed that by consenting to admit those tenures they did nothing more than agree that they held their lands mediately or immediately of the king; that they would be faithful and true to him and his successors; and that they would attend him in his wars for any period of time not exceeding forty days yearly. The other consequences, which proved so oppressive, were fastened upon them by the superior craft of the Norman lawyers.³⁰

The more important of these incidents were (1) reliefs; (2)

²⁹ The tenure by grand serjeanty is a species of military tenure in capite, quite similar to knight-service. The service was usually of an honorary sort, as to carry the king's banner, his sword, or the like. In tenure by cornage the service stipulated was to wind a horn at the approach of the king's enemies. This was a species of grand serjeanty. 2 Min. Insts. 73; 2 Bl. Com. 73, 74.

Tenure by escuage or scutage arises where a military tenant commuted his military services by the payment of money. 2 Min. Insts. 74; 2 Bl. Com. 74, note (15).

Tenure in frankalmoign (free alms) is a spiritual tenure, arising in case of religious corporations, such as monasteries; the service stipulated being prayers for the repose of the soul of the donor and his heirs, etc. 2 Min. Insts. 70; 2 Bl. Com. 102.

Petit serjeanty is a tenure in capite by the service of rendering annually some small implement of war, e. g., a bow, sword, lance, etc. 2 Min. Insts. 75; 2 Bl. Com. 81.

Burgage tenure occurs in some of the ancient English boroughs (whence its name). It recognized especially the three local customs of (1) Borough-English (by which the youngest, instead of the oldest, son succeeds as heir); (2) Free-Bench (by which the widow is endowed of all, instead of one-third, of her husband's lands); and (3) the custom in particular places, even prior to statute 32 Hen. VIII, c. 5, of devising land by will. 2 Min. Insts. 75, 76.

Gavelkind tenure still prevails in the county of Kent, where the Saxon resistance to the Normans was most obstinate. Its distinguishing properties are (1) that the tenant might alienate at the age of fifteen; (2) that the land is not subject to escheat for felony; (3) that the lands are devisable by will, independently of statute 32 Hen. VIII, c. 5; and (4) that the lands descend to all the sons together. 2 Min. Insts. 76.

³⁰ 2 Min. Insts. 71; 2 Bl. Com. 63.

aids; (3) wardship; (4) marriage; (5) fines for alienation; and (6) escheat for lack of heirs.³¹

§ 8. **Same—I. Reliefs.** Fiefs were originally voluntary donations by the lord to the vassal, the form of which was to be strictly observed, lest the lord be construed to have given away more than he intended. Hence originally it was held, even after feuds became hereditary in the tenant's family, that that child of a deceased tenant was to succeed to the feud who was nominated by the lord (who might thus protect himself against a weak or treacherous tenant). The one upon whom the lord's choice fell would usually make him a complimentary present, which was called a relief (*relevare*, to raise up), because the inheritance was thus raised up from its fallen condition. This present gradually came to be demanded as a right by the lord, who would thus charge heavily for the exercise of his choice, so that it finally became a very oppressive burden.³²

§ 9. **Same—II. Aids.** These also were in their origin mere benevolences, granted voluntarily by the tenant to the lord in times of difficulty and distress; but in process of time they came to be exacted as a right. They were usually claimed in cases where it was necessary to raise a sum of money, or its equivalent, either (1) to ransom the lord's person from captivity; or (2) to aid in knighting the lord's eldest son—a ceremony attended with much pomp and expense, which took place usually when the son reached the age of fifteen; or (3) to provide a marriage portion for the lord's eldest daughter.³³

§ 10. **Same—III. Wardship.** Since the prompt performance of services, especially those of a military character, was essential to the efficiency of the feudal system, it became customary, after the heredity of feuds was established, for the lord upon the death of the tenant to take the decedent's lands into his own custody and himself provide for the performance of the services during the minority of the heir. This was known as the right of wardship, and included also the custody and education of the ward himself, upon the plausible ground that the lord was the party most interested in training him to be a good soldier. This incident of tenure was peculiarly oppressive, since the lord was under no obligation to account to the ward for the profits of the land during the wardship.³⁴

§ 11. **Same—IV. Marriage.** Growing out of the right of wardship was the *jus maritagii* or right to dispose of the ward in mar-

³¹ 2 Min. Insts. 71, 76, 78.

³² 2 Min. Insts. 72; 2 Bl. Com. 65; 1 Washburn, Real Prop. 23, 24.

³³ 2 Min. Insts. 72; 2 Bl. Com. 63; Gilbert, Ten. Introd. xix, xx.

³⁴ 2 Min. Insts. 72; 2 Bl. Com. 67 et seq.; 1 Th. Co. Lit. 152, note (1), 288.

riage, or, if the ward declined, the right to demand the value of the marriage; that is, as much as any one would bona fide give the lord for such an alliance. If the ward contracted a marriage without the lord's consent the forfeiture was doubled. This was at first confined to female heirs, for which there was this much show of reason, that it intimately concerned the lord's welfare and safety that a female vassal should marry one friendly, and not hostile, to him.³⁵

§ 12. Same—V. Fines for Alienation. As already shown, it was not originally permitted a vassal to dispose of his feud to another, substituting a new tenant, perhaps inimical to the lord, without the latter's assent. In process of time the lords began to make merchandise of their consent in such cases, and would give it only when paid for at a round rate. This operated as a very burdensome restraint upon alienation, and was abolished by the statute *quia emptores*, 18 Edw. I, save as to the king's tenants in capite. As to the latter, the practice continued (the money value of the lord's consent being finally fixed at one-third of one year's profits) until A. D. 1660, when all military tenures and tenures in capite, with their oppressive incidents, were finally abolished by an act of Parliament converting all tenures save frankalmoign, grand sergeanty and copyhold, into free and common socage.³⁶

§ 13. Same—VI. Escheat for Lack of Heirs. An escheat occurred wherever the tenant of an hereditary fief or feud died, leaving no blood relations capable of inheriting it, or where the blood of the tenant by reason of his conviction of treason or felony became attainted or corrupted so as to be incapable of transmitting inheritance.³⁷

§ 14. Conversion of Military into Socage Tenures. The burdensome incidents above described, though originally applicable to military tenures alone, soon came for a while to be applied to socage tenures also. But long before the abolition of the military tenures by statute, 12 Car. II, c. 24 (A. D. 1660), the socage tenures had been stripped of these shackles, and had been freed from most of the burdens imposed by the feudal policy. On this account the tenure in free and common socage became the favorite tenure of lands, supplanting in considerable degree the tenure in chivalry. And when, upon the accession of Charles II, the Parliament determined

³⁵ 2 Min. Insts. 73; 2 Bl. Com. 70.

³⁶ 2 Min. Insts. 74; 2 Bl. Com. 72, 77.

³⁷ 2 Min. Insts. 73; 2 Bl. Com. 72, 73. In the United States, generally, the doctrine is that conviction of treason or felony does not work a corruption of blood, nor a forfeiture of estate—at least for a longer period than the life of the felon. Post, § 785; 2 Min. Insts. 560.

to abolish the military tenures, the easiest method of doing so was to convert them into tenures in free and common socage, which was done accordingly.³⁸

§ 15. Tenure in the United States Generally. The only feudal tenure ever recognized in this country was that of free and common socage, that being the tenure upon which all the grants of colonial land by the crown were based. And, at the time these grants were made, the socage tenure had already been stripped of all its burdensome incidents, so that they never existed here.³⁹

But after the Revolution even the shadowy subservience to sovereignty evidenced by the socage tenure became distasteful, and many of the colonies, upon attaining their independence, at once passed acts, either abolishing all tenure in terms or declaring their lands for the future to be held upon an allodial (in contradistinction to feudal) tenure, which is merely another way of saying that tenure is abolished.⁴⁰

³⁸ 2 Min. Insts. 74.

³⁹ 1 Washburn, Real Prop. 39, 40.

⁴⁰ 1 Washburn, Real Prop. 40, 41. Socage tenure is presumed to exist still in Pennsylvania, New Jersey, and South Carolina, but in no other states. 1 Washburn, Real Prop. 41; Gray, Perpet. §§ 25-28.

DIVISION II.

THE SEVERAL KINDS OF REAL PROPERTY, AND THEIR INCIDENTS.

§ 16. **Real Property Corporeal and Incorporeal.** Real property may consist in lands, tenements, and hereditaments, the last term signifying property which may be inherited by the heir of a deceased owner.⁴¹ Although this is not a logical classification, it is the usual one and for that reason is adhered to.⁴²

Of these terms the least comprehensive is "land," including only land itself, and such tangible, visible things as are attached thereto or found therein, such as houses, trees or crops growing thereon, mineral under the surface, etc.—in short, everything fixed upon it and everything belonging or attached to it, above and below the surface, *ab solo usque ad coelum*.⁴³

The term "tenement" is somewhat more comprehensive than "land," for it may include intangible, invisible rights in the land of another (such as a right of way over another's land) as well as corporeal property itself. It is a term of feudal origin, and includes everything of a permanent nature, capable of being holden of a feudal superior, for example, lands, houses, ways, franchises, commons, etc.⁴⁴

⁴¹ 2 Min. Insts. 4; 2 Bl. Com. 15.

⁴² It is illogical, because the grounds of classification are not identical. The terms "lands" and "tenements" denote the physical nature of the property, while the term "hereditaments" denotes the quantity of interest, as that the owner possesses an estate of inheritance, and not merely a life interest or one smaller still.

⁴³ Post, § 17; 2 Min. Insts. 4; 2 Bl. Com. 17 et seq.; 1 Th. Co. Lit. 197 et seq.; 4 Kent, Com. 468; 2 Washburn, Real Prop. 625. There are several subordinate terms descriptive of different sorts of land holdings, of which it will suffice to mention more specifically the following:

The term "messuage" includes the dwelling, garden and curtilage and (probably) the orchard; and "house" (or "mansion house" or "dwelling house") has much the same meaning. 2 Min. Insts. 5; 2 Bl. Com. 19, note (7); 1 Th. Co. Lit. 215, note (35).

The term "curtilage" denotes the space included within the general fence which immediately surrounds the principal messuage, embracing the out-buildings and yard closely adjoining a dwelling. 2 Min. Insts. 5; 1 Chitty, Gen. Pr. 175.

⁴⁴ 2 Min. Insts. 5; 2 Bl. Com. 16, 17; 1 Th. Co. Lit. 219. It is, of course, not to be confounded with the same term applied in modern times to houses built for the purpose of renting them. Similarly, the term "tenant," as now used, is to be distinguished from the same term as used under the feudal system.

The term "hereditament" does not denote the character of the property owned, but rather the estate or interest possessed by the owner. Any property which, upon the owner's death, may go to his heirs (not to his personal representative) is a hereditament.⁴⁵

There are but few instances of personalty possessing this peculiarity. One instance is that of heirlooms, such as family portraits, plate, etc., which in England are sometimes by local custom heritable by the heir.⁴⁶

Another example may be found in the case of annuities and corodies, which, if expressly limited to one and his heirs, though personal in their nature, descend to the heir, not to the personal representative.⁴⁷

But, save for these, and perhaps a few other, instances of personal hereditaments, they consist in the main of lands and tenements. Hence the term "hereditaments" is often used loosely as synonymous with "lands and tenements," regardless of the quantity of interest possessed by the owner—in other words, as synonymous with "real property," or "tenements." Technically, however, it is synonymous with "estates of inheritance."

In this loose sense of the word, rather than in its technical sense, real property may be properly divided into corporeal and incorporeal hereditaments; the former comprehending visible and tangible property, corresponding to the term "lands" above described, and the latter including invisible and intangible rights issuing out of lands, or concerning, annexed to, or exercisable upon or within the same, such as a right of way over the land of another, a right to drain one's land through those of another, etc. These will be examined more fully in the following chapters.⁴⁸

⁴⁵ 2 Min. Insts. 5, 6; 2 Bl. Com. 17; 1 Th. Co. Lit. 219. See *Doe v. Allen*, 8 T. R. 497; *Metropolitan Ry. Co. v. Fowler*, 1 Q. B. 165, 171, [1893] App. Cas. 416.

⁴⁶ 3 Min. Insts. 68, 70; 2 Bl. Com. 428; Co. Lit. 18b, 185b. Heirlooms are not generally regarded in the United States as devolving upon the heir of the deceased owner, but upon his personal representative, except, perhaps, in case of chattels intimately associated with the land. See 3 Min. Insts. 70.

⁴⁷ Post, § 62; 2 Min. Insts. 37, 38.

⁴⁸ See 2 Min. Insts. 6 et seq.; 2 Bl. Com. 17 et seq.; 2 Th. Co. Lit. 199, 200.

CHAPTER II.

CORPOREAL HEREDITAMENTS OR LANDS.

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- 59. III. Percolating Waters.
- 60. Ice.
- 61. Petroleum Oil and Natural Gas.

§ 17. **Land.** In its ordinary acceptation, land embraces not only a particular portion of the earth's surface, but also all that is below or above that surface, *ab solo usque ad coelum*. Hence, in the absence of stipulations to the contrary, a conveyance of "land" will pass all houses, trees, crops, water, etc., resting upon or growing out of the soil, and all minerals or other valuable things found beneath it, as well as all rights to the space above it.¹

Thus the owner of land commits no tort if he cuts off the limbs of trees overhanging his land, though the trees themselves grow upon the land of another, since he is entitled to a free approach to his land from above.² So, also, no one may shut off the light from above, illuminating a house below through a skylight, unless such right has been granted by the owner of the land expressly or by implication.³

On the same principle, the owner of land is entitled to damages for trespass, or to an injunction, or to damages in condemnation proceedings, if a telegraph or telephone company stretches its wires over his land.⁴

But, notwithstanding this general rule, cases sometimes arise where, by special agreement, the ownership of the surface and of the things above or below the surface may be in different persons. Thus, a grantor may convey the surface of the land, reserving the right to all minerals under the surface, or vice versa.⁵ Such a division of ownership creates two separate estates or in-

¹ 2 Min. Insts. 4; *Crews v. Pendleton*, 1 Leigh (Va.) 305, 19 Am. Dec. 750; *Broom's Legal Maxims*, 290; *Goddard v. Winchell*, 86 Iowa, 71, 52 N. W. 1124, 17 L. R. A. 788, 41 Am. St. Rep. 481.

² *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537; *Grandona v. Loydal*, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121. But he is not the owner of the limb, nor of the fruit attached thereto. They belong to the owner of the land from whose surface the trunk of the tree springs, though its roots run into another's soil. *Hoffman v. Armstrong*, supra; *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645. If the tree springs from the boundary line, it belongs to the owners of the two tracts as tenants in common, at least prima facie. *Hoffman v. Armstrong*, supra; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326; *Skinner v. Wilder*, supra; *Lyman v. Hale*, supra; *Holder v. Coates*, 1 Moody & M. 112.

³ *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; *Lapere v. Luckey*, 23 Kan. 534, 33 Am. Rep. 196. See *Hazelton v. Putnam*, 3 Pin. (Wis.) 107, 54 Am. Dec. 162; *Elliott v. Rhett*, 5 Rich. Law (S. C.) 405, 57 Am. Dec. 750, note.

⁴ *Board of Works v. United Telephone Co.*, 13 Q. B. Div. 904.

⁵ *Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co.*, 105 Va. 574, 591, 54 S. E. 593; *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 293, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544. In such cases, while the mine-owner may not remove the necessary subterranean support of the surface,

terests in the same land, not a common interest like that of joint-tenants or tenants in common. They are the owners of distinct subjects of entirely different natures. Hence the title to the freehold of the one, either in the surface or in the minerals, cannot be acquired by the other merely by his long-continued ownership of his own property;⁶ and the purchase of the outstanding title by the one does not enure to the benefit of the other, as it would if they were joint tenants or tenants in common.⁷

The use to which the land is put, or its form, is immaterial. It may be in the form of meadows, pastures, arable land, building lots, woods, moors, parks, marshes, lakes, etc.; but it is always land. Hence, if one were about to convey a lake or a pond, it would not be proper to describe it as so many acres of water (for that would pass only the right of fishery therein), but as so many acres of land covered with water.⁸

§ 18. Same—Equitable Conversion. The equitable doctrine of conversion sometimes demands that money should be regarded for certain purposes as though it were land, and vice versa. The doctrine is based upon the general maxim of courts of equity that "that is to be regarded as done, which ought to be done," and arises in cases where money is agreed or directed to be invested in land, or where land is agreed or directed to be sold and the proceeds to be devoted to a particular purpose. In such cases, if the rights of third persons, or some public policy, or a supervening agreement or direction of the parties interested do not intervene, equity is accustomed to impress at once upon the property that character which it is ultimately bound to assume when the agreement or direction shall have been carried out.⁹

Thus, a testator directed \$5,000 to be invested in land and divided among certain relatives, with the condition precedent that none of them should marry into a certain family, and if they should their

the surface owner must not impose additional burdens by the erection of buildings to be supported by the mineowner. 1 Washburn, Real Prop. 8.

⁶ *Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co.*, 105 Va. 574, 592, 54 S. E. 593.

⁷ *Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co.*, 105 Va. 574, 592, 54 S. E. 593. It is to be observed, however, that the prima facie presumption is in favor of the owner of the surface, and is against such a severance. *Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co.*, *supra*.

⁸ 2 Min. Insts. 6; 2 Bl. Com. 17, 18; 2 Th. Co. Lit. 199, 200.

⁹ 2 Min. Insts. 221; *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78; *Taylor v. Benham*, 5 How. 233, 12 L. Ed. 130; *Given v. Hilton*, 95 U. S. 591, 596, 24 L. Ed. 458; *Greenland v. Waddell*, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400; *Fletcher v. Ashburner*, 1 Brown, Ch. 497, 1 Wh. & Tud. Lead. Cas. Eq. 1118, 1123, 1157.

shares to be cut off, and \$3 given them instead. One of them did marry into the prohibited family. It was held that while, in general, money bequeathed to be invested in land is considered in equity as land, yet in this case, since the condition precedent had been violated by one of the devisees, she could not take, and since, therefore, as to her share no conversion occurred, that her share remained money, and as such went to the residuary legatee.¹⁰

Similarly, if a contract be made for the sale and conveyance of land, the vendor is immediately regarded in equity as the trustee of the land for the purchaser, and the purchaser as the trustee of the purchase money for the seller. The vendee's interest, although no conveyance of the title has been made, is treated in equity as real estate, and is devisable and descendible accordingly; while the vendor's interest is in equity personalty, and passes and is disposed of as such.¹¹

If the land appreciates or deteriorates in value before the conveyance is made to the vendee, the benefit accrues to, or the loss falls upon, him, and not upon the vendor,¹² unless the conveyance is delayed by the vendor's fault beyond the proper time, in which case a loss from deterioration in value falls upon the vendor, as, for example, where the delay is caused by the vendor's bad or defective title.¹³

§ 19. Same—Partnership Realty. One of the most prominent instances of equitable conversion arises in case of lands held by a partnership, purchased with partnership funds and for partnership purposes. If land is thus purchased by a firm, though at law the partners are joint tenants or tenants in common of the land, there is no doubt but that in equity a conversion occurs, and the land is to a certain extent regarded as though it were part of the personal assets of the firm.

There is, however, some question as to the extent of the conversion.

¹⁰ *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78. In *Effinger v. Hall*, 81 Va. 94, 107, it was held, *e converso*, that land directed by will to be sold is at once in equity stamped as personalty, but that those entitled thereto might elect that it retain its original form, and thus prevent the actual conversion. See 3 Pomeroy, Eq. Jur. § 1175.

¹¹ 2 Min. Insts. 221; *Coldiron v. Asheville Shoe Co.*, 93 Va. 364, 25 S. E. 238; *Craig v. Leslie*, 3 Wheat. 577, 4 L. Ed. 460. See 3 Pomeroy, Eq. Jur. § 1150 et seq.; 2 Story, Eq. Jur. § 1212 et seq.

¹² *Paine v. Meller*, 6 Ves. Jr. 349; *Reed v. Lukens*, 44 Pa. 200, 84 Am. Dec. 425; *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582; 15 Harv. Law Rev. 733. But see 9 Harv. Law Rev. 106; *Huguenin v. Courtenay*, 21 S. C. 403, 53 Am. Rep. 688.

¹³ *Christian v. Cabell*, 22 Grat. (Va.) 82; *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680, 78 Am. St. Rep. 207.

Some of the authorities hold that land thus purchased is converted into personalty only for the purpose of winding up the partnership affairs and paying off its creditors, and that, after that is done, the remaining interests therein of the individual partners are in the nature of interests in land, and not personalty.¹⁴

But the English doctrine, and the view in some of the states, is that the land so purchased is converted out and out into personalty for all purposes, not only as between the members of the partnership, respectively, and as to the creditors of the firm, but also as between the representatives of a deceased partner and those surviving. In such case, although the legal title to the land be partly or wholly in the heir or devisee of the deceased partner, yet in equity it is still deemed partnership assets, in respect of which the firm is cestui que trust and the holder of the legal title a mere trustee. Hence upon the death of one of the partners, whereby in general the firm is dissolved, the survivor or survivors become entitled, as representing cestui que trust, to have the land sold, and the proceeds (after paying the debts of the firm) divided between the surviving partners and the personal representative (not the heir) of the deceased partner.¹⁵

So, also, under the latter view, the consort of such deceased partner would not be entitled to dower or curtesy in the lands thus purchased and held by the firm, since dower and curtesy can only be had in the deceased consort's real estate.¹⁶

But under the former view, which is the one most widely adopted in this country, such consort would take dower or curtesy in such of the partnership land as remained after the settlement of the partnership affairs.¹⁷

It must be observed, however, that if two or more persons, in contemplation of a partnership, as for milling, mining, or farming, purchase land, to be used for such business, on the individual responsibility of the partners, and not with partnership funds, nor

¹⁴ *Riddle v. Whitehill*, 135 U. S. 621, 635, 10 Sup. Ct. 924, 34 L. Ed. 282; *Shearer v. Shearer*, 98 Mass. 107; *Lang v. Waring*, 25 Ala. 625, 60 Am. Dec. 533; *Foster's Appeal*, 74 Pa. 391, 15 Am. Rep. 553.

¹⁵ 2 Min. Insts. 139 et seq.; *Attorney General v. Hubback*, L. R. 13 Q. B. Div. 275, 289; *Phillips v. Phillips*, 1 My. & K. 649; *Randall v. Randall*, 7 Sim. 271; *Wheatley v. Calhoun*, 12 Leigh (Va.) 272, 37 Am. Dec. 654; *Parrish v. Parrish*, 88 Va. 529, 532, 14 S. E. 325; *Brooke v. Washington*, 8 Grat. (Va.) 255, 56 Am. Dec. 142; *Sigourney v. Munn*, 7 Conn. 11; *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631; *Andrews v. Brown*, 21 Ala. 437, 56 Am. Dec. 252. But see *Davis v. Christian*, 15 Grat. (Va.) 11, 36.

¹⁶ Post, § 247; 2 Min. Insts. 140; *Parrish v. Parrish*, 88 Va. 529, 532, 14 S. E. 325; *Howard v. Priest*, 5 Metc. (Mass.) 582; *Sumner v. Hampson*, 8 Ohio, 328, 32 Am. Dec. 722; *Duhring v. Duhring*, 20 Mo. 174.

¹⁷ *Tiffany*, Real Prop. § 187.

on partnership responsibility, or where the purchase is collateral to their partnership business, and not as a means of carrying that on, the land is not converted into partnership stock, but retains its character of realty. To raise a partnership trust by such a purchase, it must be made at the time with partnership funds or on partnership responsibility, as well as for partnership purposes.¹⁸

Thus, where W. and C. agreed to purchase two hundred acres of land on which was a mill, and, having done so, commenced and carried on the business of milling as partners for several years, it was held that there was no conversion into personalty, but that they were tenants in common of the land, and their wives entitled to dower.¹⁹

But even though the purchase money, or an installment thereof, should chance to have been paid out of the social funds, if it be paid for and on behalf of one of the individual partners, this would not raise such a trust, nor give the firm title to anything more than reimbursement. In such case, dower or curtesy would accrue to the consort of the deceased owner.²⁰

It seems hardly necessary to mention that this conversion arises only where the purchasers are partners at the time of the purchase, and operates only so long as the lands constitute a portion of the partnership property. As soon as the firm disposes of the land it loses its character (in equity) of personalty, and resumes the character of land. Hence, where two parties entered into the business of buying and selling lots, taking and giving deeds therefor as tenants in common, and lands were sold accordingly in the lifetime of both partners, it was held that by such sale the lots were withdrawn from the joint stock and that, upon the death of one of the partners, his widow might claim dower in the lands thus sold.²¹

Lastly, it should be observed that, even where the land has been purchased with partnership funds and for partnership purposes, the theory of conversion may be repelled, not perhaps as against the creditors of the firm, but as to the partners themselves, and their heirs, personal representatives and consorts, respectively, by any clear and express stipulation to the contrary, contained in the articles of partnership, or made at the time of the purchase or afterwards.²²

¹⁸ 2 Min. Insts. 140, 141; 1 Washburn, Real Prop. 161; Wheatley v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654; Hale v. Plummer, 6 Ind. 121.

¹⁹ Wheatley v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654.

²⁰ 2 Min. Insts. 141; Wheatley v. Calhoun, 12 Leigh (Va.) 264, 273, 37 Am. Dec. 654.

²¹ Markham v. Merrett, 7 How. (Miss.) 437, 40 Am. Dec. 76; Wheatley v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654; 1 Washburn, Real Prop. 161.

²² 2 Min. Insts. 141; 1 Greenleaf, Cruise, 180.

§ 20. **Same—Land Belonging to a Corporation.** Land belonging to a corporation differs in no respect from land belonging to private individuals, so far as the interest of the corporation itself therein is concerned.

But the interest of a stockholder in the land of his corporation, as represented by his certificate of stock, though by some of the older authorities regarded as real estate,²³ is, according to the modern view (even independently of statute), nothing but personalty, like any other shares of stock. Such shares are indeed only evidences of a right to claim a proportionate part of the company's profits, or, in the event of a dissolution, a proper share of the assets. The land, buildings and structures of a railroad, telegraph or canal company, or other corporation, even a land company, as well as all its other property, constitute merely the instruments whereby the stock is made to produce a profit, and belong for that purpose not to the individual corporators, but to the corporation itself.²⁴

§ 21. **Buildings upon Land—Single Story or Room.** Buildings erected upon land, whether of timber, brick, or stone, without regard to the use to which the structure is to be put, are generally considered part of the realty, though the materials of which they are composed are personal property at the time of their adaptation to the purpose.²⁵

But the ownership of a house erected upon land may sometimes be severed from that of the land by express stipulation or implied understanding, in which case the house is to be regarded as personalty. Thus a building erected upon the land of another, by the latter's license and consent, is regarded as personalty belonging to the person who erected it, and does not pass to a purchaser of the land, unless he is a purchaser without notice of the severance of

²³ 2 Min. Insts. 150; *Price v. Price*, 6 Dana (Ky.) 107. See *Park, Dower*, 113.

²⁴ 2 Min. Insts. 150; *Angell & Ames, Corp.* § 557; *Bligh v. Brent*, 2 Yo. & Col. (Exch.) 268, 294; *Bradley v. Holdsworth*, 3 M. & W. 423; *Bank of Waltham v. Inhabitants of Waltham*, 10 Metc. (Mass.) 334.

²⁵ 2 Min. Insts. 4; 2 Bl. Com. 17; *Mott v. Palmer*, 1 N. Y. 564; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236; *Lipsky v. Borgmann*, 52 Wis. 256, 9 N. W. 158, 38 Am. Rep. 735. It would seem that a building merely resting upon the surface of the ground, and not securely attached thereto by foundations, etc., is not to be regarded as part of the land, but as personalty merely. Indeed, in case of trade fixtures, the same may be sometimes said of permanent buildings whose foundations are in the ground; the tenant being given the right to remove them at the end of the term as being his property, and not part of the land. *Post*, § 29; 2 Min. Insts. 609 et seq.; *Elwes v. Maw*, 3 East, 38; *Van Ness v. Pacard*, 2 Pet. 142, 146, 7 L. Ed. 374.

the ownership; and the action of trover will lie for the house if the owner of the land refuses to permit its removal.²⁶

It is otherwise if the owner of the land has never consented to the erection of the building thereon.²⁷ Hence if one, through ignorance of his title or by mistake, builds upon the soil of another, he can neither claim the building itself nor compensation for his materials and workmanship.²⁸

For analogous reasons, if a building is placed upon mortgaged land, with the consent of the mortgagor, but without the consent of the mortgagee, it becomes part of the land and is covered by the mortgage; an agreement to the contrary being immaterial if the mortgagee be not a party to it. And a purchaser of the property at a sale under the mortgage acquires title to the building as well as the land, though he has notice of the claim of the third party to the building, as a part of the protection due to the mortgagee.²⁹

On the other hand, a dwelling house may be real estate and owned in fee simple, though its owner may have no further interest in the land upon which it stands than the right to keep it there permanently and enjoy the use of it.³⁰ So, also, one may possess an estate in a single story or room in a house, or even in part of a room, and may be seised thereof,³¹ and may maintain

²⁶ *Russell v. Richards*, 11 Me. 371, 26 Am. Dec. 532, note; *Fifield v. Bank*, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166, note. But the sale of the land by the owner would operate a revocation of the license to keep the house there, and it must be removed within a reasonable time thereafter, unless another license is obtained from the new owner. *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Russell v. Richards*, supra.

²⁷ *Kingsley v. McFarland*, 82 Me. 231, 19 Atl. 442, 17 Am. St. Rep. 473, note; *Crest v. Jack*, 3 Watts (Pa.) 239, 27 Am. Dec. 353; *West v. Stewart*, 7 Pa. 122. In such case it can only be removed by the party erecting it if he is a tenant of the land and the building is a removable fixture. Post, § 33 et seq.; 2 Min. Insts. 609 et seq.; *Elwes v. Maw*, 3 East, 38. And it is not a removable fixture, if the terms of the lease require him to erect it, and there is no agreement for its removal by the lessee. *Peirce v. Grice*, 92 Va. 767, 24 S. E. 392.

²⁸ 1 Washburn, Real Prop. 4. See *Crest v. Jack*, 3 Watts (Pa.) 239, 27 Am. Dec. 353; *West v. Stewart*, 7 Pa. 122.

²⁹ *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105, 23 Am. St. Rep. 819.

³⁰ 1 Washburn, Real Prop. 7; *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Howard v. Fessenden*, 14 Allen (Mass.) 124; *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Ingalls v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 479, 40 N. W. 524, 12 Am. St. Rep. 676.

³¹ Co. Lit. 48b; 1 Preston, Est. 214; 1 Washburn, Real Prop. 7; *Corbett v. Hill*, L. R. 9 Eq. 671; *Doe v. Burt*, 1 T. R. 701; *Humphries v. Brogden*, 12 Ad. & El. (N. S.) 747, 756; *Com. v. Hersey*, 144 Mass. 298, 11 N. E. 116; *Proprietors of South Congregational Meetinghouse in Lowell v. City of Lowell*, 1 Metc. (Mass.) 538; *Cheeseborough v. Green*, 10 Conn. 318, 26 Am.

an action of ejectment therefor if deprived of its possession;³² and this, although, if the house or room be destroyed, all interest of the owner thereof in the land on which it stood be thereby lost.³³

If we take the reverse case and suppose the owner of the land to appropriate building materials belonging to another, without the latter's assent, and to use such materials in the erection of a building on the former's land, the general rule is that the title to such materials (now composing the structure) vests in the owner of the land, because the materials themselves have lost their identity, though the owner of the materials of course retains his right of action for their value against the owner of the land and building.³⁴ It is otherwise as to chattels which, still preserving their original identity, are annexed to a building by the owner thereof without the consent of the owner of the chattel.³⁵

§ 22. **Fixtures.** Things originally real in their nature may, by the mode of dealing with them, become personalty, and things originally personal may become realty. Thus part of the soil may be taken to make brick, or stone may be taken from a quarry, or growing trees may be severed from the land for lumber. So long as either of these are part of, imbedded in, or attached to, the land they are realty, but as soon as they are detached they become personalty. Yet all of them may once more be converted into realty by being used in the erection of a building on that or other land.

But though personalty may thus be converted into realty by becoming fixed or attached to land or to buildings thereon, it does not follow that such will always be the case. Indeed, there is a large class of personal things which, when attached to land or buildings, becomes realty or remains personalty, according to the circumstances of the case, or according to the persons as between whom the question arises.

Such articles are termed "fixtures," and the main questions that arise with respect to them relate to the right of the original owner of such chattels to sever them again from the land and restore to

Dec. 396; *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Mott v. Palmer*, 1 N. Y. 564; *White v. White*, 16 N. J. Law, 202, 31 Am. Dec. 232.

³² *Doe v. Burt*, 1 T. R. 701; *Otis v. Smith*, 9 Pick. (Mass.) 293.

³³ *Stockwell v. Hunter*, 11 Metc. (Mass.) 448, 45 Am. Dec. 220.

³⁴ *Peirce v. Goddard*, 22 Pick. (Mass.) 559, 33 Am. Dec. 764; *Woodruff & Beach Iron Works v. Adams*, 37 Conn. 233; *Cross v. Marston*, 17 Vt. 533, 44 Am. Dec. 353; *Lansing Iron & Engine Works v. Walker*, 91 Mich. 409, 51 N. W. 1061, 30 Am. St. Rep. 488. See *Jackson v. Walton*, 28 Vt. 43; *Michigan Mut. Life Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035.

³⁵ *Cochran v. Flint*, 67 N. H. 514; *Gill v. De Armant*, 90 Mich. 425, 51 N. W. 527; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101.

them their character of personalty after the objects which induced him primarily to annex them have been accomplished, or when it becomes advantageous to him to sever the ownership.

This use of the term "fixtures" involves an ambiguity, because it is uncertain whether in using the term one is referring to chattels annexed to land where the ownership of the chattels may subsequently be separated from that of the land, or where it may not be so separated. Indeed, it is not seldom used by judges as well as text-writers in these two opposite senses. The student, therefore, should take care to observe, in reading cases and expositions upon the subject, what precise meaning is attached to the term by the expositor. Thus for the most part any confusion of thought will be avoided, despite the confusion of terms.³⁶

The confusion thus introduced into the terminology of the subject may be obviated, to some extent at least, by denominating such fixtures as retain their character as personalty "personal fixtures," and those which have become inseparably part of the land "real fixtures."³⁷

§ 23. **Same—Definition of Real Fixtures.** The subject of fixtures may be perhaps best discussed by defining real fixtures, and developing the controlling principles from that definition.

Real fixtures consist of things, originally chattels personal, which have been annexed to land, or to things permanently attached to land, by the owner of the chattels or with his assent, and with the intention to make the annexation permanent. All others are personal fixtures.³⁸

1. In the first place, that the things annexed to the land must, before their annexation, have been personal chattels, is a self-evident proposition, needing no elucidation.³⁹

2. In the second place it is to be observed from the definition that the chattels may be annexed either to the land itself (as in some instances of temporary structures or trade-buildings⁴⁰) or

³⁶ 2 Min. Insts. 607, 608. See *Colegrove v. Dios Santos*, 2 B. & Cr. 76; *Hollen v. Runder*, 1 Cr., Mees. & Rose, 276; *Sheen v. Rickie*, 5 M. & W. 181; *Green v. Phillips*, 26 Grat. (Va.) 752, 759, 21 Am. Rep. 323; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Huston v. Clark*, 162 Pa. 435, 29 Atl. 866; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Carpenter v. Walker*, 140 Mass. 416, 5 N. E. 160.

³⁷ See *Hopkins*, Real Prop. 11.

³⁸ See 2 Min. Insts. 607; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Green v. Phillips*, 26 Grat. (Va.) 752, 759, 21 Am. Rep. 323.

³⁹ 2 Min. Insts. 608; *Green v. Phillips*, 26 Grat. (Va.) 752, 759, 21 Am. Rep. 323.

⁴⁰ Post, § 29 et seq.; 2 Min. Insts. 609; *Elwes v. Mawe*, 3 East, 38; *Van Ness v. Pacard*, 2 Pet. 142, 146, 7 L. Ed. 374.

to structures or other things already permanently attached to the land. It is not necessary that the chattel be itself in contact with the soil; it may be attached to the walls or floors of a house.⁴¹

3. In the next place, it is in general essential, in order that the fixture may be a real fixture, that the chattel should have been annexed by the owner thereof or with his consent, since persons without an interest have usually no right to alter the nature of another's property.⁴² An exception to this principle has already been pointed out in the case of materials taken for the construction of a building without the consent of the owner of such materials, inasmuch as they have lost their identity.⁴³

4. The assent of the owner of the land or building to the annexation is immaterial. Even without it the chattel becomes a real fixture and part of the land itself, provided the other requirements exist, though the owner of the land and annexed chattel may, in the exercise of his *jus disponendi* over all his property, sever them if he chooses, and thus restore to the chattel its original character.⁴⁴

5. The most important element of the definition is the intention with which the annexation is made. In order that it may be a real fixture and become part of the land itself, it is essential that the chattel should have been annexed permanently; that is, without intention to remove it or sever the connection between it and the land.⁴⁵ This intention, however, is to be drawn from the surrounding circumstances or the express agreement of the parties, not from their mere declarations nor from idle conjecture.⁴⁶

⁴¹ 1 Tiffany, Real Prop. § 231.

⁴² Gill v. De Armant, 90 Mich. 425, 51 N. W. 527; Cochran v. Flint, 57 N. H. 514; General Electric Co. v. Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101; 1 Tiffany, Real Prop. § 231.

⁴³ Ante, § 21.

⁴⁴ Sampson v. Graham, 96 Pa. 405; Harris v. Scovel, 85 Mich. 32, 48 N. W. 173; Franks v. Cravens, 6 W. Va. 185; Hensley v. Brodie, 16 Ark. 511; Dudley v. Foote, 63 N. H. 57, 56 Am. Rep. 489; Leonard v. Clough, 133 N. Y. 292, 31 N. E. 93, 16 L. R. A. 305.

⁴⁵ Holland v. Hodgson, L. R. 7 C. P. 328; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; McRea v. Central Nat. Bank, 66 N. Y. 489; Fifield v. Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166; Snedeker v. Warring, 12 N. Y. 170; State Sav. Bank v. Kercheval, 65 Mo. 683, 27 Am. Rep. 310.

⁴⁶ McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471; State Sav. Bank v. Kercheval, 65 Mo. 682, 27 Am. Rep. 310; Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; Catasauqua Bank v. North, 160 Pa. 308, 28 Atl. 694; Snedeker v. Warring, 12 N. Y. 174.

§ 24. **Same—Circumstances from Which Intention to Annex Permanently may be Deduced.** The most important of the circumstances from which this intention is deduced are the following: (1) Express agreement as to the permanency of the annexation; (2) the character of the annexation as whether the severance of the chattel would tear or cause injury to the freehold; (3) the adaptation of the chattel for use with the freehold; (4) the nature and purposes of the fixture, whether for trade, agricultural, domestic or ornamental purposes; (5) the interest in the land of the party making the annexation, according as it is more or less permanent, the probability of an intention to annex permanently being in proportion to the permanency of the interest claimed in the land by the annexor.

In some cases, one of these may afford well-nigh conclusive evidence of an intent to annex the chattel permanently to the freehold; in others, several or all of them must combine. The circumstances of each case must determine the intent.

§ 25. **Same—I. Express Agreement as to the Permanency of the Annexation.** Articles annexed, which might otherwise be considered real fixtures and part of the land, may by express agreement be made to retain their personal character.⁴⁷

For example, if one should annex chattels to another's land by the license or permission of the latter, there is *prima facie* an agreement that they shall not become real fixtures, or part of the land, and hence they are removable at the pleasure of the owner of the chattels.⁴⁸ And so, if the owner of land, after placing a mortgage upon chattels for the purchase price or otherwise, or incumbering the chattels in any other way as by purchasing them with a reservation of title in the vendor, should annex such chattels to his land, there must be implied from the existence of the chattel mortgage or other incumbrance an intention on his part

⁴⁷ *Shelton v. Ficklin*, 32 Grat. (Va.) 727, 742, et seq.; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Mott v. Palmer*, 1 N. Y. 564; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Sisson v. Hibbard*, 75 N. Y. 542; *Sullivan v. Jones*, 14 S. C. 362; *Goodman v. Hannibal & St. J. R. Co.*, 45 Mo. 33, 100 Am. Dec. 336. See *Ford v. Cobb*, 20 N. Y. 344; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889.

⁴⁸ *Ante*, § 21; *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Ham v. Kendall*, 111 Mass. 297; *Western North Carolina R. Co. v. Deal*, 90 N. C. 110; *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491; *Brown v. Baldwin*, 121 Mo. 126, 25 S. W. 863. But see *Peirce v. Grice*, 92 Va. 767, 24 S. E. 392.

that the chattels are not to be annexed permanently, to the detriment of the mortgagee or lienor.⁴⁹

Where there is an agreement of this kind, imposing an obligation upon the landowner not to annex the chattels permanently, the obligation rests equally upon a purchaser of the land with notice of the agreement or obligation, and the chattel may be severed from the land by the one entitled thereto as against him;⁵⁰ but, according to the weight of authority, not as against a purchaser of the land for value and without notice.⁵¹

On the other hand, if the owner of the land first mortgages his land, then mortgages the chattels, and subsequently annexes the chattels to the land, as between the two mortgagees, the mortgagee of the chattels has priority, so far as that can be given him without impairing the security previously given to the mortgagee of the land.⁵²

§ 26. **Same—II. Character of the Annexation.** The mode of annexation of a chattel will often be of weight in determining whether the intent is to annex it to the freehold permanently or only temporarily.⁵³

Thus, if the chattel is actually attached to the land or building, so that it cannot be detached therefrom without seriously tearing or

⁴⁹ *Carpenter v. Allen*, 150 Mass. 281, 22 N. E. 900; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Tibbetts v. Horne*, 65 N. H. 242, 23 Atl. 145, 15 L. R. A. 56, 23 Am. St. Rep. 31; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889; *Davenport v. Shants*, 43 Vt. 546; *Jenks v. Colwell*, 66 Mich. 420, 33 N. W. 528, 11 Am. St. Rep. 502.

⁵⁰ *Morris v. French*, 106 Mass. 326; *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 13 South. 948, 46 Am. St. Rep. 56; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 25 N. E. 558, 9 L. R. A. 676, 21 Am. St. Rep. 231.

⁵¹ *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 521, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; *Brennan v. Whitaker*, 15 Ohio St. 446; *Davenport v. Shants*, 43 Vt. 546; *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889; *Tibbetts v. Horne*, 65 N. H. 242, 23 Atl. 145, 15 L. R. A. 56, 23 Am. St. Rep. 31; *Jenks v. Colwell*, 66 Mich. 420, 33 N. W. 528, 11 Am. St. Rep. 502. But see *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Ford v. Cobb*, 20 N. Y. 344; *Moff v. Palmer*, 1 N. Y. 564; *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254.

⁵² *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 399; *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105, 23 Am. St. Rep. 819; *Clary v. Owen*, 15 Gray (Mass.) 522; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446; *Davenport v. Shants*, 43 Vt. 546; *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209.

⁵³ *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *O'Donnell v. Hitchcock*, 118 Mass. 401; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Kerdall v. Hathaway*, 67 Vt. 122, 30 Atl. 859; *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639.

injuring the freehold, as in the case of a house with foundations in the earth, or staircases, marble mantles mortised in the walls, wainscoating (fastened by nails, but not by screws), etc., it is a strong, though not always conclusive, indication that the annexation was intended to be permanent, and such fixtures will generally be considered real fixtures, while the reverse of these conditions is some evidence at least that the annexation was intended to be temporary only.⁵⁴

Occasionally, however, chattels of a heavy and permanent character, even though not actually imbedded in, nor attached to, the freehold, but merely held in place by their own weight, such as buildings, fences, etc., have been held to be real fixtures, though no tearing of the freehold would result were they removed.⁵⁵

§ 27. **Same—III. Adaptation of the Chattel for Use with the Freehold.** The fact that the particular fixture is peculiarly adapted for use with the realty is a pregnant indication that it was intended to be permanently annexed, and that it is therefore a real fixture. Especially is this true, if the chattel in question is not only useful in connection with the land or building, but usually accompanies such property, or is indispensable to its proper and complete enjoyment.⁵⁶

Thus, machinery, engines, boilers, etc., in mills and factories, without which the business could not be conducted, are real fixtures, and not ordinarily susceptible of legal removal save by the owner of the land; ⁵⁷ and so are window shutters, doors, keys, mill-

⁵⁴ 2 Min. Insts. 608; *McRea v. Central Nat. Bank*, 66 N. Y. 495; *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674; *Ford v. Cobb*, 20 N. Y. 344; *Murdock v. Gifford*, 18 N. Y. 28; *Bliss v. Whitney*, 9 Allen (Mass.) 114, 85 Am. Dec. 745; *Whiting v. Brastow*, 4 Pick. (Mass.) 310; *Degraffenreid v. Scruggs*, 4 Humph. (Tenn.) 451, 40 Am. Dec. 658; *Clark v. Hill*, 117 N. C. 11, 23 S. E. 91, 53 Am. St. Rep. 574; *Bewick v. Fletcher*, 41 Mich. 625, 3 N. W. 162, 32 Am. Rep. 170; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *State Sav. Bank v. Kercheval*, 65 Mo. 687, 27 Am. Rep. 310; *Thomas v. Davis*, 76 Mo. 72, 43 Am. Rep. 756; *Teaff v. Hewitt*, 1 Ohio St. 511, 534, 59 Am. Dec. 634.

⁵⁵ *Holland v. Hodgson*, L. R. 7 C. P. 334; *Snedeker v. Warring*, 12 N. Y. 170; *Stockwell v. Campbell*, 39 Conn. 364, 12 Am. Rep. 393; *Landon v. Platt*, 34 Conn. 517; *Glidden v. Bennett*, 43 N. H. 306.

⁵⁶ 2 Min. Insts. 612; *Green v. Phillips*, 26 Grat. (Va.) 752, 759, 21 Am. Rep. 323; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Huston v. Clark*, 162 Pa. 435, 29 Atl. 866, 868; *Ferris v. Quimby*, 41 Mich. 202, 2 N. W. 9; *Wade v. Donau Brewing Co.*, 10 Wash. 284, 38 Pac. 1009.

⁵⁷ 2 Min. Insts. 612; *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 306, 38 Am. Dec. 368; *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12; *Walker v. Sherman*, 20 Wend. (N. Y.) 636; *Voorhees v. McGinnis*, 48 N. Y. 278; *Rice v. Adams*, 4 Har. (Del.) 332; *Keeler v. Keeler*, 31 N. J. Eq. 181; *Case*

stones, and the like, though capable of being detached without breaking or tearing the building—although at the time actually detached for a temporary purpose, as to be painted, etc. They are parts of the freehold, and cannot be seized under execution as personalty, nor removed by a tenant without liability for waste, though the tenant himself annexed them to the premises.⁵⁸

§ 28. Same—IV. Nature and Purposes of the Fixture. The nature of the fixture and the uses to which it is to be put furnish very important evidence of the intention with which it is annexed to the freehold.

Chattels are usually thus annexed either for purposes of trade, of agriculture, or for domestic or ornamental purposes.

Permanent annexation is most strongly presumed where the chattel is affixed to the freehold for domestic or ornamental purposes, least strongly in case of trade and agricultural fixtures. Indeed, in the case of trade and agricultural fixtures, the presumption that they are personal and removable fixtures is due rather to a broad public policy for the encouragement of these pursuits than to any particular presumption of intention.

§ 29. Same—1. Trade Fixtures. With respect to trade fixtures, it is well settled both in England and in the United States that they occupy a favored position, and, to encourage trade, are more freely removable than domestic, or ornamental, or (in England) agricultural fixtures. Indeed, the general rule may be said to be that they are freely removable, at least as between tenant and landlord.⁵⁹

Thus, showcases, counters and shelves,⁶⁰ boilers and engines,⁶¹

Mfg. Co. v. Garven, 45 Ohio St. 289, 13 N. E. 493; *Christian v. Dripps*, 28 Pa. 271.

⁵⁸ 2 Min. Insts. 612; *Green v. Phillips*, 26 Grat. (Va.) 752, 761, 21 Am. Rep. 323; *Shelton v. Ficklin*, 32 Grat. (Va.) 727; *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 314, 38 Am. Dec. 368; *Poole's Case*, 1 Salk. 368; *Herlakenden's Case*, 4 Co. 64a.

⁵⁹ 2 Min. Insts. 610 et seq.; *Guthrie v. Jones*, 108 Mass. 191; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Smith v. Whitney*, 147 Mass. 479, 18 N. E. 229; *Kile v. Giebner*, 114 Pa. 381, 7 Atl. 154; *Conrad v. Saginaw Min. Co.*, 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817; *Poole's Case*, 1 Salk. 368; *Elwes v. Maw*, 3 East, 38, 2 Smith, Lead. Cas. 191; *Van Ness v. Pacard*, 2 Pet. 137, 7 L. Ed. 374.

⁶⁰ *Guthrie v. Jones*, 108 Mass. 191; *McCall v. Walter*, 71 Ga. 287.

⁶¹ *Cooper v. Johnson*, 143 Mass. 108, 9 N. E. 33; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Conrad v. Saginaw Min. Co.*, 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817; *Crane v. Brigham*, 11 N. J. Eq. 29; *Lamar v. Miles*, 4 Watts (Pa.) 330; *Green v. Phillips*, 26 Grat. (Va.) 752, 760, 21 Am. Rep. 323.

a vat in a soap factory,⁶² and even buildings,⁶³ have been held to be personal fixtures and removable.

In *Penton v. Robart*,⁶⁴ the building removed by the tenant consisted of a brick foundation let into the ground, with a chimney belonging to it, and upon this foundation a superstructure of wood brought by the tenant from elsewhere, and used for trade purposes, had been erected. It would seem that the tenant took away, not only the wooden superstructure, but the brick foundation and chimney. This, however, the report of the case leaves in doubt. But Lord Kenyon held that the tenant had done no more than he had the right to do, the erection being for trade purposes, and no reference is made to the question whether or not the whole building was removed.

§ 30. **Same—2. Agricultural Fixtures.** With respect to agricultural fixtures, such as barns, sheds, etc., the English doctrine is that they are not easily removable like trade fixtures, but for the most part are real fixtures and not to be severed.⁶⁵

But in the United States the tendency is to regard fixtures annexed by the tenant for agricultural purposes as entitled to no less favor than those annexed for purposes of trade. There is with us, considering the unpeopled condition of a large proportion of the territory of these states, a manifest policy to promote the cultivation and improvement of the country. The owner of the soil, as well as the public, has every motive to encourage the tenant to devote himself to agriculture and to favor any erection which shall aid this result. But, as Judge Story observes in a leading case, what agricultural tenant could afford to erect structures of much expense or value if he is to lose his whole interest therein by the very act of erection?⁶⁶

§ 31. **Same—3. Manure as a Fixture.** In connection with agricultural fixtures, it may be observed that manure made on a farm, as a result of the feeding to stock of crops raised thereon, is gen-

⁶² *Poole's Case*, 1 Salk. 368.

⁶³ *Elwes v. Maw*, 3 East, 38, 2 Smith, Lead. Cas. 191; *Penton v. Robart*, 2 East, 88; *Van Ness v. Pacard*, 2 Pet. 142, 146, 7 L. Ed. 374; *Western North Carolina R. Co. v. Deal*, 90 N. C. 110; *Macdonough v. Starbird*, 105 Cal. 15, 38 Pac. 510; *Walton v. Wray*, 54 Iowa, 531, 6 N. W. 742.

⁶⁴ 2 East, 88. See, also, *Van Ness v. Pacard*, 2 Pet. 142, 146, 7 L. Ed. 374. But see *Peirce v. Grice*, 92 Va. 767, 24 S. E. 392.

⁶⁵ 2 Min. Insts. 610, 611; *Elwes v. Maw*, 3 East, 38, 2 Smith, Lead. Cas. 191.

⁶⁶ 2 Min. Insts. 611; *Van Ness v. Pacard*, 2 Pet. 145, 7 L. Ed. 374. See *Wing v. Gray*, 36 Vt. 261; *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; *McMath v. Levy*, 74 Miss. 450, 21 South. 9, 523.

erally regarded as a real fixture, and is not removable by a tenant for years or at will.⁶⁷

On the same principle, such manure passes by a conveyance of the land, in the absence of an agreement to the contrary;⁶⁸ and upon a mortgage of the land, the mortgagor after maturity of the mortgage may be enjoined from removing it by the mortgagee.⁶⁹ So, it has been held that such manure goes, upon the death of the fee-simple owner of the land, to the heir along with the land, and not to the personal representative of the deceased owner;⁷⁰ and that, though piled in heaps and not scattered over the land as it has fallen, it is real property, and therefore not subject to an execution.⁷¹

On the other hand, if the manure be brought upon the land from elsewhere, as from a livery stable, or if the stock is fed with feed raised elsewhere, the manure is a personal fixture, and as such is removable by a tenant for years or at will, in the absence of a contrary agreement.⁷² In such case, likewise, it will not pass with the land under a conveyance.⁷³

§ 32. Same—4. Domestic and Ornamental Fixtures. Domestic and ornamental fixtures are the least easily removable of all. There are not the same reasons of policy here as exist in the case of trade and (in this country) agricultural fixtures to permit an easy severance of them. In general, therefore, they may be removed—at least by another than the fee-simple owner of the land to which

⁶⁷ 2 Min. Insts. 605; *Daniels v. Pond*, 21 Pick. (Mass.) 371, 32 Am. Dec. 269; *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169; *Hill v. De Rochemont*, 48 N. H. 87; *Sawyer v. Twiss*, 26 N. H. 345; *Lewis v. Jones*, 17 Pa. 262, 55 Am. Dec. 550; *Gallagher v. Shipley*, 24 Md. 418, 87 Am. Dec. 611; *Parsons v. Camp*, 11 Conn. 530. But see *Smithwick v. Ellison*, 24 N. C. 326, 38 Am. Dec. 697; *Staples v. Emery*, 7 Me. 201.

⁶⁸ *Kittredge v. Woods*, 3 N. H. 503, 14 Am. Dec. 393; *Needham v. Allison*, 24 N. H. 355; *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Norton v. Craig*, 68 Me. 275; *Wetherbee v. Ellison*, 19 Vt. 379. But see *Ruckman v. Outwater*, 28 N. J. Law, 581.

⁶⁹ *Chase v. Wingate*, 68 Me. 204, 28 Am. Rep. 86.

⁷⁰ *Fay v. Muzzey*, 13 Gray (Mass.) 53, 74 Am. Dec. 619. See *Sawyer v. Twiss*, 26 N. H. 345.

⁷¹ *Sawyer v. Twiss*, 26 N. H. 345.

⁷² *Fletcher v. Herring*, 112 Mass. 382; *Strong v. Doyle*, 110 Mass. 92; *Daniels v. Pond*, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; *Lassell v. Reed*, 6 Me. 222; *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169; *Snow v. Perkins*, 60 N. H. 493, 49 Am. Rep. 333; *Sawyer v. Twiss*, 26 N. H. 345; *Gallagher v. Shipley*, 24 Md. 418, 87 Am. Dec. 611; *Lewis v. Jones*, 17 Pa. 267, 55 Am. Dec. 550.

⁷³ *Snow v. Perkins*, 60 N. H. 493, 49 Am. Rep. 333; *Needham v. Allison*, 24 N. H. 355; *Fay v. Muzzey*, 13 Gray (Mass.) 53, 74 Am. Dec. 619. See *Collier v. Jenks*, 19 R. I. 137, 32 Atl. 208, 61 Am. St. Rep. 741.

they are attached—only where the circumstances indicate strongly the intention that the annexation should be merely temporary, as that the chattel is so affixed as to be easily detachable without tearing or injuring the freehold,⁷⁴ and that it is not essential to the complete enjoyment thereof.⁷⁵

Hence mirrors, wardrobes, stoves, radiators, lavatories, chandeliers, chimney pieces, marble mantles, and even wainscoating, fixed by screws, etc., have been frequently held to be removable by a tenant for years, without imputation of waste, when annexed by himself.⁷⁶

§ 33. **Same—V. Interest of the Annexor in the Land.** One of the most important circumstances in ascertaining the probable intention with which chattels have been annexed to lands or buildings is the interest or estate possessed by the annexor in the latter. Questions of this sort are apt to arise most frequently in the following cases: (1) Where the annexor is the fee-simple owner of the land; (2) where the annexor is tenant of the land for years or at will; and (3) where he is tenant of the land for life.

§ 34. **Same—1. Annexor the Fee-Simple Owner of the Land.** If the proprietor of the land himself annexes the chattels, a doubt as to his intention to annex them permanently will in most cases be resolved in favor of such an intent, upon the theory that his design is to place permanent improvements upon his property, which will enhance its usefulness and consequently its market value. Such fixtures are in general real fixtures, and become a permanent part of the land or buildings to which they are attached.

Hence, if the owner of the inheritance die intestate, such fixtures ordinarily descend to the heir together with the land, and do not, unless previously severed by the owner, go to his personal representative.⁷⁷ So, also, if he sell or convey the land, not having severed the chattels therefrom, they pass with the land to which

⁷⁴Ante, § 26.

⁷⁵Ante, § 27.

⁷⁶2 Min. Insts. 608; *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353; *Weston v. Weston*, 102 Mass. 514; *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64; *Gaffield v. Hapgood*, 17 Pick. (Mass.) 192, 28 Am. Dec. 290; *Catasauqua Bank v. North*, 160 Pa. 303, 28 Atl. 694; *Vaughen v. Haldeman*, 33 Pa. 522, 75 Am. Dec. 622; *Aldine Mfg. Co. v. Barnard*, 84 Mich. 632, 48 N. W. 280; *Johnson v. Wiseman*, 4 Metc. (Ky.) 357, 83 Am. Dec. 475.

⁷⁷2 Min. Insts. 612; *Herlakenden's Case*, 4 Co. 63b; *Elwes v. Maw*, 3 East. 38, 2 Smith, Lead. Cas. 191; *Fisher v. Dixon*, 12 Cl. & F. 312; *Green v. Phillips*, 26 Grat. (Va.) 752, 759, 21 Am. Rep. 323; *Gibbs v. Estey*, 15 Gray (Mass.) 587; *Stillman v. Flenniken*, 58 Iowa, 450, 10 N. W. 842, 43 Am. Rep. 120; *Tuttle v. Robinson*, 33 N. H. 104; *Hays v. Doane*, 11 N. J. Eq. 84. The doctrine of "trade fixtures" has no application here. *Fisher v. Dixon*, 12 Cl. & F. 312; *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742; *Foote v. Gooch*, 96 N. C. 265, 1 S. E. 525, 60 Am. Rep. 411.

they are annexed;⁷⁸ and the same is true if he mortgage it,⁷⁹ unless the chattels themselves are subject to mortgage or lien at the time they are annexed.⁸⁰

In like manner they will pass by a devise of the land, though not specially mentioned;⁸¹ and, being part of the land, they cannot be levied upon under an execution of *fieri facias*.⁸²

All that has been said above is subject to the qualification that the fee-simple owner, after annexing the chattels and thus giving them the character of real estate, may, at any time before the rights of third parties to the land intervene, sever the connection, and thus restore to the chattels their character of personalty distinct from the land.

This severance may be actual, by detachment of the fixture;⁸³ or it may be constructive, by express or implied agreement to that effect on the part of the owner of the land.

Thus, if the owner of the land sells or agrees to sell the fixture

⁷⁸ 2 Min. Insts. 612; *Green v. Phillips*, 26 Grat. (Va.) 752, 21 Am. Rep. 323; *Gibbs v. Estey*, 15 Gray (Mass.) 587; *Ford v. Cobb*, 20 N. Y. 344; *Walker v. Sherman*, 20 Wend. (N. Y.) 636; *Mott v. Palmer*, 1 N. Y. 564; *Stillman v. Fenniken*, 58 Iowa, 450, 10 N. W. 842, 43 Am. Rep. 120; *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 310, 38 Am. Dec. 368; *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780; *Leonard v. Clough*, 133 N. Y. 292, 31 N. E. 93, 16 L. R. A. 305; *Michigan Mut. Life Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035. But see *Davis v. Eastham*, 81 Ky. 116.

⁷⁹ 2 Min. Insts. 612; *Meux v. Jacobs*, L. R. 7 H. L. 481; *Shelton v. Ficklin*, 32 Grat. (Va.) 727; *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 306, 38 Am. Dec. 368; *Clary v. Owen*, 15 Gray (Mass.) 522; *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311; *Brennan v. Whitaker*, 15 Ohio St. 446.

⁸⁰ Ante, § 25.

⁸¹ *Norton v. Dashwood*, [1896] 2 Ch. 497.

⁸² 2 Min. Insts. 612; *Green v. Phillips*, 26 Grat. (Va.) 752, 21 Am. Rep. 323.

⁸³ *Sampson v. Graham*, 96 Pa. 405; *Franks v. Cravens*, 6 W. Va. 185; *Harris v. Scovel*, 85 Mich. 32, 48 N. W. 173; *Hensley v. Brodie*, 16 Ark. 511. But the detachment must be with the intent to sever permanently. *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68; *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Lewis v. Rosler*, 16 W. Va. 333; *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490; *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780. An accidental severance, as by tempest, or a wrongful severance by one not entitled to make it, will effect no change in the nature of the article against the wish of the landowner. 2 Min. Insts. 603; *Herlakenden's Case*, 4 Co. 62a; *Lewis v. Rosler*, supra; *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789; *Rogers v. Gilinger*, 30 Pa. 185, 72 Am. Dec. 694; *Goodrich v. Jones*, supra. But see *Ruckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *State v. Goodnow*, 80 Mo. 271.

separate from the land,⁸⁴ or mortgages it,⁸⁵ the mere agreement operates as a constructive severance, and makes the fixture an entity distinct from the land, so that it will not pass with the land upon a conveyance of the latter—at least, if the purchaser of the land have notice of such agreement.⁸⁶

It is worthy of notice that, since, until severance, the fixture is real property, a transfer of the same is a transfer of real property, and must accord with the provisions of the statute of frauds relating to conveyances of, and contracts to convey, land.⁸⁷

§ 35. **Same—2. Annexor Tenant of the Land for Years or at Will.** If the party annexing the chattels is merely a lessee of the premises for a limited time, it is hardly probable that in annexing chattels of value he intends thereby to make a permanent gift of them to improve the landlord's property. There must be clear evidence of so eccentric a purpose, as, for example, that he fastens the chattel to the land in such a manner that it cannot be detached without tearing or otherwise injuring the freehold.⁸⁸

Whether the fixture thus annexed by the tenant is a real fixture or a personal one (and as such removable by him) depends upon the circumstances and considerations which have been already outlined in the preceding sections.

It must be observed, however, that the removal of the fixture (when it is removable) by the lessee must take place during the term; that is, before the possession is relinquished or, in case of a tenant for life or at will, within a reasonable time after the termination of the estate. If postponed, the removal or attempt at re-

⁸⁴ *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Dudley v. Foote*, 63 N. H. 57, 56 Am. Rep. 489; *Davis v. Emery*, 61 Me. 140, 14 Am. Rep. 553. But see *Aldrich v. Husband*, 131 Mass. 480; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *Gibbs v. Estey*, 15 Gray (Mass.) 587.

⁸⁵ *Tyson v. Post*, 108 N. Y. 217, 15 N. E. 316, 2 Am. St. Rep. 409; *Gooding v. Riley*, 50 N. H. 400.

⁸⁶ *Shelton v. Ficklin*, 32 Grat. (Va.) 727, 736; *Brennan v. Whitaker*, 15 Ohio St. 446; *Fenlason v. Rackliff*, 50 Me. 362. According to some decisions, even if the purchaser of the land is without notice of the agreement, he is still bound thereby, and cannot claim the fixtures under his conveyance. *Richardson v. Copeland*, 6 Gray (Mass.) 536, 66 Am. Dec. 424; *Keeler v. Keeler*, 31 N. J. Eq. 181.

⁸⁷ *Dudley v. Foote*, 63 N. H. 57, 56 Am. Rep. 489; *Leonard v. Clough*, 133 N. Y. 292, 31 N. E. 93, 16 L. R. A. 305; *Rice v. Adams*, 4 Har. (Del.) 332; *Meyers v. Schemp*, 67 Ill. 469.

⁸⁸ 2 Min. Insts. 613; *Youngblood v. Eubank*, 68 Ga. 630; *Thomas v. Crout*, 5 Bush (Ky.) 37; *Osgood v. Howard*, 6 Me. 452, 20 Am. Dec. 322. See *Deane v. Hutchinson*, 40 N. J. Eq. 83, 2 Atl. 292; *Andrews v. Day Button Co.*, 132 N. Y. 348, 30 N. E. 831; *Peirce v. Grice*, 92 Va. 763, 24 S. E. 392; *Conrad v. Saginaw Min. Co.*, 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817; *Gaffield v. Hapgood*, 17 Pick. (Mass.) 192, 28 Am. Dec. 290.

removal, while not waste (for waste can occur only during a tenancy), is a trespass, for the articles remaining fixed to the land after the term is ended become the property of the landlord along with the land itself.⁸⁹

§ 36. **Same—3. Annexor Tenant of Land for Life.** If the annexor of the chattels is a tenant for life of the land, a case is presented which is intermediate between the other two. It will require stronger circumstances to permit a tenant for life, or his personal representative, to remove fixtures thus attached, than it would to authorize such a removal by a tenant for years or at will; and, on the other hand, less pregnant circumstances will justify a tenant for life in treating the fixtures as personal than would suffice if the question were to arise between the heir and personal representative of a deceased fee-simple owner of land who had himself annexed the fixtures, or between a vendor and vendee, or mortgagor and mortgagee, of the land.⁹⁰

§ 37. **Fructus Naturales and Fructus Industriales.** In determining the question whether the vegetable growths of the soil are to be regarded as part of the soil (land) or as personalty, a distinction must be drawn between those products which grow spontaneously or with only occasional care bestowed upon them and those which are the result of annual labor and cultivation. The first class is known as "fructus naturales"; the second as "fructus industriales." The former (fructus naturales) are very generally regarded as real estate, while the latter (fructus industriales) are for the most part, though not always, held to be personalty, even while still attached to and growing upon the land.⁹¹

⁸⁹ 2 Min. Insts. 613; *Penton v. Robart*, 2 East, 88; *Elwes v. Maw*, 3 East, 38, 2 Smith, Lead. Cas. 191; *Horn v. Baker*, 9 East, 215; *Lee v. Risdon*, 7 Taunt. 188; *Colegrave v. Dios Santos*, 2 B. & Cr. 76; *Sampson v. Camperdown Cotton Mills (C. C.)* 64 Fed. 939; *Hadlick v. Stober*, 11 Ohio St. 482; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700; *Josslyn v. McCabe*, 46 Wis. 591, 1 N. W. 174. But if the tenant holds over with the consent of the landlord, he does not lose his right of removal. *Lewis v. Ocean Nav. & Pier Co.*, 125 N. Y. 341, 26 N. E. 301; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554. If, however, he accepts a new lease with different terms he may lose the right. *McIver v. Estabrook*, 134 Mass. 550; *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173. See *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362.

⁹⁰ 2 Min. Insts. 614. See *Elwes v. Maw*, 3 East, 38, 2 Smith, Lead. Cas. 191; *Lawton v. Salmon*, 1 H. Bl. 260, note; *Lawton v. Lawton*, 3 Ark. 12; *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 743, 744; *Overman v. Sasser*, 107 N. C. 432, 12 S. E. 64, 10 L. R. A. 722; *Van Ness v. Pacard*, 2 Pet. 137, 7 L. Ed. 374; *McCullough v. Irvine*, 13 Pa. 438; *Demby v. Parse*, 53 Ark. 526, 14 S. W. 899, 12 L. R. A. 87.

⁹¹ Post, §§ 38, 41.

The distinctions between these two classes of products and the principles governing them will be developed in the succeeding sections.

§ 38. Fructus Naturales—Trees, Grass, etc., Growing upon the Land. It is well settled that trees, grass, and other spontaneous growths, requiring little or no periodical cultivation, while growing upon the land, are part thereof, and are not to be regarded as chattels.

Thus, they are held to pass with the land upon a sale, conveyance or mortgage thereof, unless expressly reserved or excepted;⁹² and also upon a devise thereof in the absence of a contrary intention shown in the will,⁹³ unless the growths have already been disposed of to a third person, in which case, of course, they will not pass, if the purchaser of the land purchases with notice of such transfer or incumbrance.⁹⁴ On the same principle, fructus naturales are not subject to levy under execution, but must be subjected to debts as land;⁹⁵ and they pass to the heir.⁹⁶

§ 39. Same—Estovers. The tenant of land for life, for years or at will, in the absence of agreement express or implied, has in general no direct interest in the fructus naturales growing thereon, save to gather the mast or fruit of them, and to utilize the growing

⁹² *Stuart v. Pennis*, 91 Va. 688, 691, 22 S. E. 509; *Batterman v. Albright*, 122 N. Y. 484, 25 N. E. 856, 11 L. R. A. 800, 19 Am. St. Rep. 510; *Reed v. Swan*, 133 Mo. 100, 34 S. W. 483; *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284; *Tripp v. Hasceig*, 20 Mich. 254, 4 Am. Rep. 388; *Terhune v. Elberson*, 3 N. J. Law, 726; *Kittredge v. Woods*, 3 N. H. 503, 14 Am. Dec. 393; *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Backenstoss v. Stahler*, 33 Pa. 251, 75 Am. Dec. 592; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438. In case they are reserved by the grantor or mortgagor, he thereby impliedly reserves also such a right in the soil as is sufficient to sustain them and the right to enter on the land for the purpose of removing them. *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776; *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; *McClintock's Appeal*, 71 Pa. 365; *Wait v. Baldwin*, 60 Mich. 622, 27 N. W. 697, 1 Am. St. Rep. 551; *Alcutt v. Lakin*, 33 N. H. 507, 66 Am. Dec. 739.

⁹³ *In re Chamberlain*, 140 N. Y. 390, 35 N. E. 602, 37 Am. St. Rep. 568; *Stall v. Wilbur*, 77 N. Y. 158; *Budd v. Hiler*, 27 N. J. Law, 43; *Smith v. Barham*, 17 N. C. 420, 25 Am. Dec. 721; *Cooper v. Woolff*, 2 Hurl. & N. 122.

⁹⁴ *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284; *Hershey v. Metzgar*, 90 Pa. 218; *Wait v. Baldwin*, 60 Mich. 622, 27 N. W. 697, 1 Am. St. Rep. 551.

⁹⁵ *Stuart v. Pennis*, 91 Va. 688, 691, 22 S. E. 509. See *Whipple v. Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; *Stewart v. Doughty*, 9 Johns. (N. Y.) 108; *Craddock v. Riddlesbarger*, 2 Dana (Ky.) 205; *Parham v. Thompson*, 2 J. J. Marsh. (Ky.) 159; *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21; *Pattison's Appeal*, 61 Pa. 294, 100 Am. Dec. 637; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284.

⁹⁶ *Stuart v. Pennis*, 91 Va. 688, 691, 22 S. E. 509.

trees for shade. The general ownership remains in the proprietor of the inheritance, and it is waste if the tenant cuts them down or injures them. Even if they are severed by accident (as by tempest) or by a third person, though at once losing the character of realty, they remain the property of the owner of the inheritance.⁹⁷

But an important qualification must be noted to this general principle, in the case of estovers (Fr. *estoffer*, to furnish) or botes (Ang.-Sax. *bot*, amends or compensation); that is, the right impliedly given to every tenant for life, for years or at will⁹⁸ to cut down and use as much of the timber growing on the premises as he may require for purposes of fuel, repairs, fences, etc., provided he takes no more than is necessary for these purposes and uses it for no other. If he takes it for sale or exchange, he is guilty of waste.⁹⁹

§ 40. Same—Trees, etc., after Severance. After the trees, grass, or other *fructus naturales* are severed from the land, they at once lose their character as part of the land, and become personal property. The severance may be actual, as by cutting down timber, or it may be constructive, the trees, etc., actually continuing to grow upon the soil as before. In either case, immediately after the severance, the *fructus naturales* become personalty, though in case of a constructive severance the owner of the *fructus naturales* has an interest in the soil itself, in the nature of an easement, sufficient for their support and nourishment, with the right to enter upon the land to remove them.¹

Such a constructive severance occurs where the owner of the land sells trees growing thereon,² or even where he mortgages them (after the maturity of the mortgage).³ It also occurs when he sells the land, excepting the trees growing thereon.⁴

⁹⁷ 2 Min. Insts. 603; ante, § 34.

⁹⁸ 2 Min. Insts. 603; 2 Bl. Com. 144; *Hawpe v. Bumgardner*, 103 Va. 91, 96, 48 S. E. 554.

⁹⁹ 2 Min. Insts. 101, 603; 2 Bl. Com. 122, 282; 1 Th. Co. Lit. 624; *Hawpe v. Bumgardner*, 103 Va. 91, 96, 48 S. E. 554. Somewhat analogous to this is the tenant's right, at any reasonable time he pleases, to cut down underwood, so that he does not destroy the young timber and subsequent growth. 2 Min. Insts. 603, 604; post, § 382.

¹ *Liford's Case*, 11 Co. 46b; *White v. Foster*, 102 Mass. 375; *Wait v. Baldwin*, 60 Mich. 622, 27 N. W. 697, 1 Am. St. Rep. 551; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *Asher Lumber Co. v. Cornett*, 58 S. W. 438, 22 Ky. Law Rep. 569, 56 L. R. A. 672; *Baker v. Jordan*, 3 Ohio St. 438.

² *Bac. Abr. Executors* (H) 3; *Stukeley v. Butler*, Hobart, 300; *Asher Lumber Co. v. Cornett*, 58 S. W. 438, 22 Ky. Law Rep. 569, 56 L. R. A. 672; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173.

³ *Bank of Lansingburgh v. Crary*, 1 Barb. (N. Y.) 542, 547; *Kimball v. Sattley*, 55 Vt. 285, 45 Am. Rep. 614. See *First Nat. Bank v. Beegle*, 52 Kan. 709, 35 Pac. 814, 39 Am. St. Rep. 365.

⁴ *Baker v. Jordan*, 3 Ohio St. 438; *Sterling v. Baldwin*, 42 Vt. 306.

While, as just shown, a sale of the growing trees, etc., converts them at once into personalty, it is quite another thing to say that such sale is itself a sale of personalty. The point is of especial importance in respect to the operation of the statute of frauds, which provides that no action shall lie upon "any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them," unless the contract or a memorandum or note thereof be in writing, signed by the party to be charged thereby or his agent.⁵

The weight of authority seems to be in favor of the view that a sale of grass or trees growing upon land, or of fruit growing upon such trees, is, *prima facie* at least, a sale of an interest in land, and therefore comes within the statute,⁶ unless under the agreement the title is not to pass until the products have been severed, in which case the contract is for the sale of chattels, and is governed by another provision of the statute of frauds: "No contract for the sale of any goods, wares, and merchandises for the price of £10 sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum be in writing signed by the party to be charged or his agent."⁷

§ 41. **Fructus Industriales—Growing Crops—General Nature and Incidents.** If the vegetable products are the result of annual labor and cultivation, and especially if annually renewed and gathered, like cereals and garden products, they are *fructus industriales*, and are for many purposes, after they have matured, considered as personalty, even before severance, while for other purposes they are regarded as part of the land from which they spring.

Thus, upon a conveyance, sale, mortgage or devise of the land upon which the crops are growing, they, like *fructus naturales*, pass therewith, in the absence of a stipulation to the contrary.⁸

⁵ 29 Car. II. c. 3, § 4. This statute has been substantially followed by the statutes of most of our states. Clark, Cont. 91.

⁶ *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509; *Hirth v. Graham*, 50 Ohio St. 57, 33 N. E. 90, 19 L. R. A. 721, 40 Am. St. Rep. 641; *Slocum v. Seymour*, 36 N. J. Law, 138, 13 Am. Rep. 432; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *Howe v. Batchelder*, 49 N. H. 204; *Green v. Armstrong*, 1 Denio (N. Y.) 550; *Bowers v. Bowers*, 95 Pa. 477; *Harrell v. Miller*, 35 Miss. 700, 72 Am. Dec. 154; *Buck v. Pickwell*, 27 Vt. 158; *White v. Foster*, 102 Mass. 375. But see *Byassee v. Reese*, 4 Metc. (Ky.) 372, 83 Am. Dec. 481; *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591.

⁷ 29 Car. II. c. 3, § 17. This provision of the statute has also been substantially followed in most of our states. Clark, Cont. 136. See *Killmore v. Howlett*, 48 N. Y. 569; *Dorris v. King* (Tenn. Ch. App.) 54 S. W. 683; *Smith v. Surman*, 9 B. & Cr. 561.

⁸ Ante, § 40. See *Terhune v. Elbertson*, 3 N. J. Law, 726; *Smith v. Price*,

On the other hand, if the owner of the land sells the crops growing thereon, whether this is a sale of land (to which the fourth section of the statute of frauds is applicable) or of personalty (to which the seventeenth section applies) depends upon whether the crops are, at the time of the sale, ripe and ready for harvest. If so, they no longer need to draw sustenance from the soil, their association with it is terminated, and they are to be regarded as personalty; whereas if they are not yet ripe, and until they are, they are part of the realty, just as are *fructus naturales*.⁹

On the same principle, if the owner of the land die intestate, the *fructus industriales*, if already mature and ready for harvest, pass to the personal representative, and not to the heir.¹⁰

For the same reason, the *fructus industriales*, if immature and unripe, cannot be levied on under an attachment or execution as personalty.¹¹ But, if ripe, they are to be regarded as personalty, and hence may be levied upon as such under an attachment or execution.¹²

39 Ill. 28, 89 Am. Dec. 284; *Tripp v. Hasceig*, 20 Mich. 254, 4 Am. Rep. 388; *Heavilon v. Heavilon*, 29 Ind. 509; *Batterman v. Albright*, 122 N. Y. 484, 25 N. E. 856, 11 L. R. A. 800, 19 Am. St. Rep. 510; *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Kittredge v. Woods*, 3 N. H. 503, 14 Am. Dec. 393; *Backenstoss v. Stahler*, 33 Pa. 251, 75 Am. Dec. 592; *Reed v. Swan*, 133 Mo. 100, 34 S. W. 483; *Treat v. Dorman*, 100 Cal. 623, 35 Pac. 86; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438; *Adams v. Beadle*, 47 Iowa, 439, 29 Am. Rep. 487; *Stall v. Wilbur*, 77 N. Y. 158; *In re Chamberlain*, 140 N. Y. 390, 35 N. E. 602, 37 Am. St. Rep. 568; *Smith v. Barham*, 17 N. C. 420, 25 Am. Dec. 721.

⁹ *Bank of Pennsylvania v. Wise*, 3 Watts (Pa.) 406; *Noble v. Smith*, 2 Johns. (N. Y.) 52, 56, 3 Am. Dec. 399; *Smith v. Champney*, 50 Iowa, 174; *Burleigh v. Piper*, 51 Iowa, 649, 2 N. W. 520; *Ellithorpe v. Reidesil*, 71 Iowa, 315, 32 N. W. 238; *Branton v. Griffiths*, 2 C. P. Div. 212. But see *Smith v. Johnston*, 1 Pen. & W. (Pa.) 471, 21 Am. Dec. 404; *Ticknor v. McClelland*, 84 Ill. 471; *Williamson v. Steele*, 3 Lea (Tenn.) 527, 31 Am. Rep. 652.

¹⁰ *Sherman v. Willett*, 42 N. Y. 146; *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21; *McGee v. Walker*, 106 Mich. 521, 64 N. W. 482; *Dennett v. Hopkinson*, 63 Me. 350, 18 Am. Rep. 227.

¹¹ *Ellithorpe v. Reidesil*, 71 Iowa, 315, 32 N. W. 238; *Martin v. Knapp*, 57 Iowa, 336, 10 N. W. 721; *Hecht v. Dettman*, 56 Iowa, 679, 7 N. W. 495, 10 N. W. 241, 41 Am. Rep. 131; *Whipple v. Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; *Stewart v. Doughty*, 9 Johns. (N. Y.) 108; *Parham v. Tompson*, 2 J. J. Marsh. (Ky.) 159; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284.

In *Ellithorpe v. Reidesil*, *supra* (an attachment of unripe crops), the court says: "The whole proceeding was on the theory that the crops were personal property, and could be levied on and sold as such; but while they remained immature and were being nurtured by the soil, they were attached to and constituted part of the realty. They could no more be levied on and sold on execution as personalty than could the trees growing on the premises." But see *Craddock v. Riddlesbarger*, 2 Dana (Ky.) 206; *Stambaugh v. Yeates*, 2 Rawle (Pa.) 161.

¹² 1 Washburn, Real Prop. 5; *Penhallow v. Dwight*, 7 Mass. 34, 5 Am.

§ 42. **Same—Emblements.** The principles regulating *fructus industriales* examined in the preceding section suppose the crops to be planted by the fee simple proprietor of the land. We are now to consider the case of a tenant of the land for life, for years or at will whose estate in the land terminates before the crops have been harvested, and the right to such crops as between him or his personal representative and the fee simple proprietor.

Under certain conditions the tenant (or his personal representative) is given the right, notwithstanding the termination of his interest in the land, to enter thereon and continue the cultivation of the crop, to harvest the same when it matures, and to remove it when harvested. In such cases the crops are termed “*emblements*” and are regarded as personalty belonging to the tenant, or if he be dead to his personal representative.¹³ The right pertains to a tenant for life,¹⁴ or for the life of another, where *cestui que vie* dies in the lifetime of the tenant *pur autre vie*; ¹⁵ to a tenant at will, whose estate is terminated without his default; ¹⁶ to a tenant from year to year, where the tenancy is terminated by notice from the landlord; ¹⁷ and in certain cases even to a tenant for years, if his estate terminates irregularly and unexpectedly, as where the landlord is himself only a life tenant and dies, thereby immediately terminating the interest of his tenant for years.¹⁸ But tenants by sufferance are not entitled to emblements, since they have no rightful possession, being only not trespassers; ¹⁹ nor are those who have unlawfully disseised another.²⁰

Dec. 21; *Heard v. Fairbanks*, 5 Metc. (Mass.) 111, 38 Am. Dec. 394; *Pat-tison's Appeal*, 61 Pa. 294, 100 Am. Dec. 637; *Evans v. Roberts*, 5 B. & Cr. 832.

¹³ 2 Min. Insts. 102 et seq.; 2 Bl. Com. 122, 123; 1 Washburn, Real Prop. 102.

¹⁴ 2 Min. Insts. 102; 2 Bl. Com. 122; *Thornton v. Burch*, 20 Ga. 791.

¹⁵ *Graves v. Weld*, 5 B. & Ad. 105; *Bradley v. Bailey*, 56 Conn. 374, 15 Atl. 746, 1 L. R. A. 427, 7 Am. St. Rep. 316; *Bevans v. Briscoe*, 4 Har. & J. (Md.) 139; *Reilly v. Ringland*, 39 Iowa, 106.

¹⁶ 2 Min. Insts. 104, 199; *Oland's Case*, 5 Co. 116a; *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318; *Samson v. Rose*, 65 N. Y. 411; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Reilly v. Ringland*, 39 Iowa, 106; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438; *Howell v. Schenck*, 24 N. J. Law, 89.

¹⁷ 2 Taylor, Landl. & Ten., § 534; *Kingsbury v. Collins*, 4 Bing. 202; *Clark v. Harvey*, 54 Pa. 142.

¹⁸ 2 Min. Insts. 104; 2 Bl. Com. 122 et seq., 146; 1 Washburn, Real Prop. 102 et seq.

¹⁹ 2 Min. Insts. 104; 2 Bl. Com. 146; 1 Washburn, Real Prop. 103; *Doe v. Turner*, 7 M. & W. 226; *Miller v. Cheney*, 88 Ind. 466, 470.

²⁰ *Hodgson v. Gascoigne*, 5 B. & Ald. 88; *DeMott v. Hagerman*, 8 Cow. (N. Y.) 220, 18 Am. Dec. 443; *Brothers v. Hurdle*, 32 N. C. 490, 51 Am. Dec. 400; *McGinniss v. Fernandes*, 135 Ill. 69, 26 N. E. 109, 25 Am. St. Rep.

The tenant's right to emblements is based upon grounds of justice and expediency. There is an obvious propriety in permitting him that sows to reap, so that he may be compensated for the labor and expense of tilling, manuring and sowing the soil. And public policy is thereby best subserved, in that it encourages husbandry by assuring to the cultivator of the soil the fruits of his labor, thereby leading him, because he sows in hope, to sow liberally, and, since he is sure to reap, to cultivate with diligence and thrift.²¹

It should be particularly noted that the doctrine of emblements does not warrant the continued occupancy by the tenant of any part of the premises except so much as may be occupied by the growing emblements themselves.²² Subject to this qualification, the tenant may enter upon the land, cultivate the crop, cut and harvest it when mature, and remove and dispose of it; and if interfered with in the reasonable exercise of these privileges by the landlord, he may maintain an action therefor.²³

Whether, at common law, the tenant shall be required to pay rent for the premises occupied by the emblements for the time elapsing between the termination of his estate and the harvesting, is somewhat doubtful. But the better opinion seems to be that, unless the estate is terminated by the act of the lessor (as in case of an estate at will), the tenant or his personal representative shall pay rent.²⁴

§ 43. Same—Requisites for Emblements—Enumeration. The general common-law principle of emblements is that the *fructus industriales* belong to the tenant or his personal representative in all those cases where crops have been sowed by the tenant, whose estate is unexpectedly terminated before harvest, without default of the tenant (by the act of God, of the law or of a third person), and in no other cases.²⁵

Put negatively (for convenience of treatment), emblements will not be allowed in the following cases, discussed more fully in the

347; *Craig v. Watson*, 68 Ga. 115; *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235. But, if a disseisor plant crops and harvest them, it is said that he acquires a good title to them. 1 *Tiffany*, Real Prop. § 224; *Faulcon v. Johnston*, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737; *Stockwell v. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710; *Page v. Fowler*, 39 Cal. 412, 2 Am. Ren. 462; *Jenkins v. McCoy*, 50 Mo. 348; *Lindsay v. Winona & St. P. R. Co.*, 29 Minn. 411, 13 N. W. 191, 43 Am. Rep. 228. But see *Liford's Case*, 11 Co. 51.

²¹ 2 Min. Insts. 102; 2 Bl. Com. 122; 1 Washburn, Real Prop. 101, 102; 1 Lom. Dig. 41.

²² 2 Min. Insts. 102, 103; 2 Bl. Com. 122, 123; 1 Washburn, Real Prop. 102 et seq.

²³ 2 Min. Insts. 102; *Forsythe v. Price*, 8 Watts (Pa.) 282, 34 Am. Dec. 465.

²⁴ 2 Min. Insts. 106; 2 Plowd. Rep. Queries, 44a, 239; 1 Washburn, Real Prop. 105; 1 Lomax, Ex'rs, 430.

²⁵ 2 Min. Insts. 103, 105, et seq.; 2 Bl. Com. 122, 123, note (3); 1 Wash-

succeeding sections: (1) Where the tenant expects his term to end before harvest and yet sows; (2) where his estate, even though of uncertain duration, is terminated before harvest by his own act or default; (3) where the crops are not sown by the tenant; (4) where the land is lost to the tenant by title paramount.

§ 44. **Same—I. Tenant's Estate Expected to Terminate before Harvest.** In this case, all the grounds upon which emblements are given cease to apply. A tenant who plants crops knowing that his interest in the land will cease before they can be harvested has no claim in justice or policy to the consideration of the law. He has generously or foolishly bestowed his time, his labor and his money upon the land for the benefit of his successor in interest, not for his own.²⁶ Hence a lessee for a term certain (say, one year), who plants crops which cannot mature before his term is ended, is entitled to no emblements.²⁷

But if the lessee's estate be for his life, or for the life of another, or until a marriage or other uncertain event, etc., and the lessee sows and his estate terminates without his default before harvest by his death, or the death of *cestui que vie*, or by the occurrence of the marriage or other event, his personal representative (in the first case), or he himself (in the second and third), may have free ingress and egress to cultivate, harvest, and carry away the crop.²⁸

A tenant by the curtesy is a life tenant, and therefore his personal representative is entitled to emblements.²⁹ But in the case of a tenant in dower, though she also is a life tenant, the common law prohibited emblements to her personal representative; the reason assigned being that she was presumed to have gotten the crops growing on her husband's lands at the time of his death, and that she ought not to get this benefit at the end as well as at the beginning of her estate.³⁰ But by the English statute of Merton³¹ emblements of dower lands may pass and be disposed of as in other cases of life estates.

• So, also, though the tenant be a lessee for years (a term certain),

burn, *Real Prop.* 103 et seq.; *Price v. Pickett*, 21 Ala. 741; *Hawkins v. Skeggs*, 10 Humph. (Tenn.) 31; *Graves v. Weld*, 5 B. & Ad. 105; *Bulwer v. Bulwer*, 2 B. & Ald. 471.

²⁶ 2 Min. Insts. 105; 2 Bl. Com. 122, note (3); 1 Washburn, *Real Prop.* 103.

²⁷ *Harris v. Carson*, 7 Leigh (Va.) 632, 30 Am. Dec. 510; *Whitmarsh v. Cutting*, 10 Johns. (N. Y.) 360; *Sanders v. Ellington*, 77 N. C. 255; *Dircks v. Brant*, 56 Md. 500; *Hendrixon v. Cardwell*, 68 Tenn. 389, 40 Am. Rep. 93.

²⁸ 2 Min. Insts. 103; 1 Lom. Dig. 42; 2 Bl. Com. 122. See, also, cases cited ante, § 42.

²⁹ 2 Min. Insts. 103, 104; 2 Bl. Com. 122.

³⁰ 2 Min. Insts. 104; 1 Washburn, *Real Prop.* 103.

³¹ 20 Hen. III, c. 2.

yet if he receive his lease from one who is himself only a tenant for life, and who dies, thereby unexpectedly terminating the former's estate, the lessee is upon common-law principles entitled to emblements. Even though the landlord (the tenant for life) should terminate his estate by his own act (and so not himself be entitled to emblements), yet that circumstance will not prevent his sublessee or assignee from asserting his claim thereto. Hence, if a tenant *durante viduitate* (during widowhood) should sublease or assign part of the premises, and then marry in defiance of the prohibition, though she would by her marriage defeat her own title to the emblements growing on that portion of the premises retained by her, the sublessee or assignee of the other part would not lose his right to the crops growing on his part, he being in no default.³²

§ 45. **Same—Right to Away-Going Crops by Local Custom.** In England and in some of these states (for example, Pennsylvania, New Jersey, and Delaware), by the usage of particular localities, which is allowed to enter into and form a part of the contract of lease, a tenant for a term certain, who sows with a knowledge that his lease will expire before harvest, may notwithstanding be entitled to the emblements. This is termed the doctrine of "away-going crops" (though it might more properly be styled the "right of the away-going tenant to the crops)."³³

§ 46. **Same—II. Tenant's Estate Terminated by His Own Act or Default.** Here again neither justice nor policy—the grounds upon which emblements rest—demands that the tenant, even though he knows not the end of his term, should have emblements. He has deliberately terminated his estate before harvest by his own act or default, and he has no right to complain of the ensuing consequences. He can claim emblements only where his estate is determined by an act of God, of the law, of the lessor, or of some person other than himself.³⁴

Hence, if a tenant at will himself terminates the estate, if a ten-

³² 2 Min. Insts. 104; 2 Bl. Com. 124; 1 Washburn, Real Prop. 104; Bevens v. Briscoe, 4 Har. & J. (Md.) 139.

³³ 2 Min. Insts. 105; 1 Washburn, Real Prop. 106; Wigglesworth v. Dallison, 1 Dougl. 201, 207, note (8); Stultz v. Dickey, 5 Bin. (Pa.) 285, 6 Am. Dec. 411; Biggs v. Brown, 2 Serg. & R. (Pa.) 14; Van Doren v. Everitt, 5 N. J. Law, 460, 528, 8 Am. Dec. 615; Shaw v. Bowman, 91 Pa. 414; Forsythe v. Price, 8 Watts (Pa.) 282, 34 Am. Dec. 465; Templeman v. Biddle, 1 Har. (Del.) 522; Clark v. Banks, 6 Houst. (Del.) 584; Foster v. Robinson, 6 Ohio St. 90.

³⁴ 2 Min. Insts. 105, 106; 1 Washburn, Real Prop. 103; Oland's Case, 5 Co. 116a; Davis v. Eyton, 7 Bing. 154; Carney v. Mosher, 97 Mich. 554, 56 N. W. 935; Samson v. Rose, 65 N. Y. 411; Hawkins v. Skeggs, 10 Humph. (Tenn.) 31; Debow v. Colfax, 10 N. J. Law, 128.

ant *durante viduitate* marries, if a tenant for life commits suicide, or if a tenant "during coverture" himself commits the act which leads to a divorce terminating his estate, in all these cases emblements will be denied. With respect to the last mentioned, it may be observed that the mere commencement of divorce proceedings by the party aggrieved does not deprive that party of emblements, for it is the sentence of the court that dissolves the marriage and terminates the tenancy, and that is an act of the law.³⁵

It is further to be noted that if the tenant sells the growing crop, and then terminates his estate by his own act, the assignee of the crop will have no more right thereto than the tenant himself, and cannot claim the emblements.³⁶

§ 47. **Same—III. Crop Not Planted by Tenant.** At common law the tenant is not entitled to emblements, if at the time his estate terminates he has merely prepared the ground for the crop, without having planted it; nor is he, it seems, even entitled to compensation for such preparation.³⁷

Again, not only must the crop have been planted at the time of the termination of the tenant's estate, but it must have been planted by the tenant himself (or his agent). Hence, if A., seised of land, sows it, and afterwards conveys it to B. for life, remainder to C. for life, and B. dies before harvest, B.'s executor shall not have emblements, but they shall go with the land to the remainderman (C); and should C. also die before harvest, they will return with the land to the reversioner (A).³⁸

Upon like principles, if a woman seised in fee or for life sows her land and then marries, and her husband dies before the crop is severed, she, and not his personal representative, shall have emblements, though, if the husband survive until after the harvest, he is at common law entitled to the crop.³⁹

And so, if a life tenant plants crops, and afterwards assigns or sublets his estate to another, and dies before harvest, the assignee or sublessee is not entitled to the crops, for he has not planted them himself.⁴⁰

³⁵ 2 Min. Insts. 105, 106; 2 Bl. Com. 122, note (3), 123; 1 Washburn, Real Prop. 103; 1 Lomax, Ex'rs, 422; Oland's Case, 5 Co. 116a.

³⁶ 1 Washburn, Real Prop. 104; Debow v. Colfax, 10 N. J. Law, 128.

³⁷ 2 Min. Insts. 103; 2 Bl. Com. 122, 123, note (3); 1 Washburn, Real Prop. 103 et seq.

³⁸ 2 Min. Insts. 106; 1 Lomax, Ex'rs, 422; Grantham v. Hawley, Hobart, 135.

³⁹ 2 Min. Insts. 106; 1 Washburn, Real Prop. 104.

⁴⁰ 1 Washburn, Real Prop. 104.

§ 48. **Same—IV. Tenant's Estate Terminated by Title Paramount.** In such case, the tenant's lease being avoided ab initio, the right to emblements does not attach.⁴¹

Hence, if the owner of the fee mortgages the land, and afterwards leases it to a tenant who plants crops, if the mortgage is foreclosed before harvest, the mortgagee's title is superior to that of the tenant (supposing the mortgage to have been recorded or the tenant to have had notice thereof), and the tenant cannot claim emblements as against the mortgagee unless he has planted with the mortgagee's consent. The crops pass with the land to the mortgagee, whether planted by the mortgagor or his tenant.⁴²

But the opposite result obtains if there be merely a priority of lien, no estate or title in the land passing to the lien creditor—and that, even though the lien is acquired before the land is leased. A mere lien, even a superior lien, does not create a title paramount. Hence a purchaser under a judgment lien is postponed to a tenant who leases the land and plants it before a sale of the land under the judgment lien.⁴³

§ 49. **Minerals and Mines.** By the term "minerals," as here used, is meant solid rock or ore, not substances of a liquid or gaseous consistency, like petroleum oil or natural gas, which are also sometimes classified as minerals. Different principles control the latter, and the discussion of them is reserved for a subsequent section.⁴⁴

As we have heretofore seen, the ownership of land in general includes not only the surface of the soil, but everything beneath it,⁴⁵ including all veins and strata of ore, clay, stone, etc., imbedded in the earth; and while thus "in place" these substances are real estate, though upon a severance therefrom by one authorized to make it they become personalty, like other things severed from land.⁴⁶

⁴¹ *King v. Fowler*, 14 Pick. (Mass.) 238; *Howell v. Schenck*, 24 N. J. Law, 89.

⁴² 2 Min. Insts. 106; 1 Washburn, Real Prop. 106; *Crews v. Pendleton*, 1 Leigh (Va.) 297, 19 Am. Dec. 750; *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; *Gilman v. Wills*, 66 Me. 273; *Downard v. Groff*, 40 Iowa, 597. See *Lewis v. Klotz*, 39 La. Ann. 259, 1 South. 539; *Cassilly v. Rhodes*, 12 Ohio, 88.

⁴³ 2 Min. Insts. 106; 1 Washburn, Real Prop. 106; *Bittinger v. Baker*, 29 Pa. 66, 70 Am. Dec. 154.

⁴⁴ Post, § 61.

⁴⁵ Ante, §§ 16, 17.

⁴⁶ *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313; *Merced Mining Co. v. Boggs*, 3 Wall. 304, 18 L. Ed. 245; *Brown v. Morris*, 83 N. C. 251; *State v. Burt*, 64 N. C. 619; *Noble v. Sylvester*, 42 Vt. 146; *Dunham v. Kirkpatrick*, 101 Pa. 36, 47 Am. Rep. 696; *Stoughton's Appeal*, 88 Pa. 198; *Hartwell v.*

The minerals in place under the surface are susceptible of an ownership distinct from that of the surface, and may constitute a separate corporeal hereditament. The title to the surface and soil may be vested in one person, and that to the mines and minerals under the surface in another.⁴⁷

In construing grants of mining rights, care must be taken to distinguish between the conveyance of the minerals themselves in place (which usually confers upon the grantee the exclusive ownership and control thereof, and implies a license to dig for and remove them) and the mere grant of an authority, license, or profit à prendre, under which the grantee is entitled to mine the ore, stone, etc., and remove it, in which case he has no interest in the land or in any ore save that actually mined. In the latter case, also, unless expressly stipulated, the grantee's right to mine is not exclusive of the right of the owner of the soil or his assignee to do likewise.⁴⁸

In either aspect, in the absence of stipulation, the grantee is entitled to so much of the minerals only as he may obtain without detriment to the rights of the owner of the surface.⁴⁹ And on the other hand the surface owner may not impose additional burdens, such as buildings, etc., on the surface, so as to impair the rights of the mine owner.⁵⁰

Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448. By the common law of England, however (though it is otherwise in this country, at least as to the public lands of the United States), all gold and silver ores, though found upon the lands of private individuals, belong to the king by virtue of the royal prerogative. See *Case of Mines*, Plowd. 310; *Moore v. Smaw*, 17 Cal. 222, 79 Am. Dec. 123.

⁴⁷ Ante, § 17; *Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co.*, 105 Va. 574, 54 S. E. 593; *Lee v. Bumgardner*, 86 Va. 315, 10 S. E. 3; *Stoughton v. Leigh*, 1 Taunt. 402; *Chester Emery Co. v. Lucas*, 112 Mass. 424; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 293, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 14 Am. Rep. 322; *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289; *Williams v. Gibson*, 84 Ala. 228, 4 South. 350, 5 Am. St. Rep. 368; *Massot v. Moses*, 3 S. C. 168, 16 Am. Rep. 697; *Sloan v. Lawrence Furnace Co.*, 29 Ohio St. 568.

⁴⁸ *Castillero v. United States*, 2 Black. 168, 17 L. Ed. 360; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955; *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317; *Williams v. Gibson*, 84 Ala. 228, 4 South. 350, 5 Am. St. Rep. 368; *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322; *List v. Cotts*, 4 W. Va. 543; *Ryckman v. Gillis*, 57 N. Y. 68, 15 Am. Rep. 464; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Grubb v. Grubb*, 74 Pa. 25; *Scioto Fire Brick Co. v. Pond*, 38 Ohio St. 65; *Hartford & S. Ore Co. v. Miller*, 41 Conn. 112; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Massot v. Moses*, 3 S. C. 168, 16 Am. Rep. 697; *Funk v. Haldeman*, 53 Pa. 229; *Silsby v. Trotter*, 29 N. J. Eq. 228.

⁴⁹ *Coleman v. Chadwick*, 80 Pa. 81, 21 Am. Rep. 93.

⁵⁰ 1 Washburn, Real Prop. 5; *Green v. Putnam*, 8 Cush. (Mass.) 21; *Horner v. Watson*, 79 Pa. 242, 21 Am. Rep. 55.

§ 50. **Water and Water Rights—Corporeal Rights.** Water rights may be either corporeal, as where the question is of the ownership and the right to use the water itself, or incorporeal easements in the lands of another, carrying the right to rid one's land of surplus or undesirable water by shedding it upon or through adjoining land. The former class only will be considered under this discussion of corporeal property, the latter being postponed to be treated in the chapter dealing with Easements.

Our attention will here be confined to water viewed as tangible, corporeal property, and in this aspect we shall consider ownership in (1) surface streams; (2) subterranean streams; and (3) percolating waters.⁵¹

§ 51. **I. Surface Streams.** Streams flowing in natural channels are the God-given means of furnishing water to man and beast and to the thirsty earth. They furnish the natural drainage of cities, supply in increasing amount the power that drives mills and factories, and constitute natural and economical highways for navigation and commerce.

It is manifest, therefore, that rights to the use, consumption or diversion of running water may be of very great consequence, and fully deserve the protection and regulation of the law. This protection and regulation the law affords by the application of well-defined rules, which may, for the most part, be summarized in the general statements that each riparian proprietor is entitled to use the water and to have it continue to flow as it has been accustomed to flow, and, on the other hand, since the other riparian owners have the same right, that he cannot himself interfere materially with such flow.⁵² Otherwise expressed, each riparian owner may make such use of the water flowing through or past his land as he may choose, provided he does not impair the equal rights of the other riparian proprietors. The main question is when does he impair such rights.

§ 52. **Same—1. Rights of Upper Riparian Owners as against Lower Proprietors.** This topic naturally divides itself into two heads: (1) The right to appropriate, use and consume the water as it passes: and (2) the right to pollute it.

§ 53. **Same—A. Appropriation of Water.** The well-settled general rule on this point is that each riparian proprietor has *ex jure naturæ* an equal right to the reasonable use of water running in a

⁵¹ See *Carpenter v. Gold*, 88 Va. 551, 14 S. E. 329; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391.

⁵² 1 *Tiffany*, Real Prop. § 297; 3 *Kent. Com.* 439 et seq.; *Angell*, Water Courses, §§ 88, 95, et seq.; *Gould, Waters*, § 204.

natural course through or by his land for every useful purpose to which it can be applied, whether domestic, agricultural or manufacturing, provided it continues to run, after such use, as it is wont to do, without material diminution or alteration and without pollution; but he cannot diminish its quantity materially or exhaust it (except perhaps for domestic purposes and in the watering of cattle) to the prejudice of the lower proprietors, unless he has acquired a right to do so by grant, prescription or license.⁵³

It is to be observed that, if the use of the water by the upper proprietor is unreasonable or otherwise illegal, the lower proprietor may maintain an action or sue out an injunction, although there may have been no actual, but only potential, damage; that is, a possible future injury from the present invasion of the right.⁵⁴ In such cases the action or injunction is permitted in order to vindi-

⁵³ 2 Min. Insts. 28; 3 Min. Insts. 17; *Hoy v. Sterrett*, 2 Watts (Pa.) 327, 27 Am. Dec. 313; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85; *Garwood v. New York Cent. & H. R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452; *Gehlen v. Knorr*, 101 Iowa, 700, 70 N. W. 757, 36 L. R. A. 697, 63 Am. St. Rep. 416; *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; *White v. East Lake Land Co.*, 96 Ga. 415, 23 S. E. 393, 51 Am. St. Rep. 141; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 South. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262. As to the proprietor's right to exhaust the supply of water in his domestic use and in watering his cattle, see *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394; *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Arnold v. Foot*, 12 Wend. (N. Y.) 330; *Anderson v. Cincinnati Southern Ry.*, 86 Ky. 45, 5 S. W. 49, 9 Am. St. Rep. 263; *Ferrea v. Knipe*, 28 Cal. 341, 87 Am. Dec. 128; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631. That only reasonable use of the water may be made for manufacturing and irrigating purposes, see *Pitts v. Lancaster Mills*, 13 Metc. (Mass.) 156; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 South. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 306, 8 Am. Dec. 404; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Wheatley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 637; *Tolle v. Correth*, 31 Tex. 362, 98 Am. Dec. 540; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636, and note. As to what is a reasonable use of water for manufacturing purposes, see (in addition to cases above cited) *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Cary v. Daniels*, 8 Metc. (Mass.) 466, 41 Am. Dec. 532; *Thurber v. Martin*, 2 Gray (Mass.) 394, 61 Am. Dec. 468; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526; *Baltimore City v. Appold*, 42 Md. 442.

⁵⁴ *Trevett v. Prison Ass'n of Virginia*, 98 Va. 332, 36 S. E. 373, 50 L. R. A. 564, 81 Am. St. Rep. 727, 6 Va. Law Reg. 148, note; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 South. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241, 247; *Cary v. Daniels*, 8 Metc. (Mass.) 466, 41 Am. Dec. 532; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636, note; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 272.

cate the plaintiff's right and to prevent the loss of it by adverse user, or prescription, which might result if the user were permitted to continue unquestioned for the period of prescription.⁵⁵

While an upper proprietor has no legal right to divert permanently the flow of the water from the lower proprietors, he may reasonably alter the course of the stream while it is upon his land for purposes of irrigation, though he thereby lengthens the channel through which it must run before reaching the lands below and thus causes some decrease of its volume, if only by evaporation and absorption. *De minimis non curat lex*, and a right of action by a lower proprietor under such circumstances would depend upon the nature and extent of the injury complained of and the manner of using the water.⁵⁶ But if the diversion be for an artificial use (for example, supplying a city with water), in contradistinction to a natural use (for example, domestic or agricultural purposes), it seems such a diversion is actionable without proof of special damage.⁵⁷

In conclusion of the subject, it is to be observed that the right to use water running in natural channels is confined to those who own land immediately upon the stream, and does not extend (nor can it be assigned) to persons owning property not bordering on the stream.⁵⁸

⁵⁵ *Newhall v. Ireson*, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; *Garwood v. New York Cent. & H. R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526, note. But if the lower proprietor (the complainant) is not actually using the water and is not actually damaged by the misuse thereof, he can recover only nominal damages. *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394. Or in equity he can only enjoin the improper use of the stream to the extent that it may work a sensible injury to him "for any purpose for which he may now or in the future have use for said water." *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 South. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; *Garwood v. New York Cent. & H. R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452.

⁵⁶ *Cook v. Seaboard Air Line Ry.*, 107 Va. 35, 57 S. E. 564, 10 L. R. A. (N. S.) 966, 122 Am. St. Rep. 825; *Norton v. Volentine*, 14 Vt. 239, 39 Am. Dec. 220; *Blanchard v. Baker*, 8 Greenl. (Me.) 253, 23 Am. Dec. 504; *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394; *Canfield v. Andrews*, 54 Vt. 1, 41 Am. Rep. 828; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385. The right to divert freshet water is no less clear than the right to divert the ordinary stream, provided the extra water be not thereby thrown in increased volume on adjacent land. *Cook v. Seaboard Air Line Ry.*, *supra*; *Burwell v. Hobson*, 12 Grat. (Va.) 322, 65 Am. Dec. 247.

⁵⁷ *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 South. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72.

⁵⁸ *Swindon Water Works Co. v. Canal Nav. Co.*, L. R. 7 H. L. 697; *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 300; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 South.

§ 54. **Same—B. Pollution of Water.** In general, the upper proprietor cannot in using the water impair its quality, so that it will come to the lower proprietors in a polluted condition.⁵⁹ But this rule is qualified by the other, no less important, that each proprietor is entitled to a reasonable use of the water as it passes him, and, if pollution is a necessary consequence of a perfectly reasonable use of the water, it is to the lower proprietor *damnum absque injuria*.⁶⁰

And one who purchases land lying upon a stream permanently polluted by sewage, or with knowledge of such pollution, is nevertheless not estopped from maintaining an action for damages for the pollution.⁶¹

§ 55. **Same—2. Rights of Lower as against Upper Proprietors—Obstruction of Flow.** The right most apt to be claimed by a lower proprietor is that of obstructing the flow of the stream by dams, etc., whereby the water is caused to flow back and submerge the lands of the upper proprietors, or interfere with their mills or factories.

In the absence of an agreement express or implied, or a statute authorizing such submergence or interference, it is well settled that the lower proprietor has no such right, since to hold otherwise would be to set at naught the means supplied by Providence for the natural drainage of the country.⁶²

78, 4 L. R. A. 572, 11 Am. St. Rep. 72; *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183.

⁵⁹ *Young v. Bankier Distillery Co.*, [1893] App. Cas. 691; *Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Merrifield v. Lombard*, 13 Allen (Mass.) 16, 90 Am. Dec. 172; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *McCallum v. Germantown Water Co.*, 54 Pa. 40, 93 Am. Dec. 656; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 11 South. 26, 30 Am. St. Rep. 546, note.

⁶⁰ *Trevett v. Prison Ass'n of Virginia*, 98 Va. 332, 36 S. E. 373, 50 L. R. A. 564, 81 Am. St. Rep. 727; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Merrifield v. City of Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Red River Roller Mills v. Wright*, 30 Minn. 249, 15 N. W. 167, 44 Am. Rep. 194; *Baltimore City v. Warren Mfg. Co.*, 59 Md. 96; *Hazeltine v. Case*, 46 Wis. 391, 1 N. W. 66, 32 Am. Rep. 715; 1 *Tiffany, Real Prop.* § 297.

⁶¹ *Virginia Hot Springs Co. v. Grose*, 106 Va. 477, 56 S. E. 222.

⁶² *American Locomotive Co. v. Hoffman*, 105 Va. 343, 54 S. E. 25, 6 L. R. A. (N. S.) 252; *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Pixlev v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72 (injury by percolation, not by submerision); *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Thompson v. Crocker*, 9 Pick. (Mass.) 59; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Omelvany v. Jaggars*, 2 Hill (S. C.) 634, 27 Am. Dec. 417; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Casebeer v. Mowry*, 55 Pa. 419, 93 Am. Dec. 766; *Neal v. Henry*, Meigs (Tenn.) 17, 33 Am. Dec. 125; *Heath v.*

On the other hand, an obstruction of the flow which causes no injury to upper proprietors is unobjectionable, and the fact that injury is caused thereby in times of extraordinary flood, such as is not reasonably to be looked for, is immaterial.⁶³ But submergence of, or interference with, the rights of owners above, when the result of ordinary or periodical freshets, comes within the rule, and the lower proprietor is liable for the damage resulting.⁶⁴

Before leaving the subject, it may be well to state that acts have been passed in many states authorizing under certain circumstances these obstructions of the flow, and providing for the compensation of upper proprietors whose lands are subjected thereby to overflow, etc. These are usually known as "Mill Acts."⁶⁵

§ 56. Same—3. Public or Navigable Waters. A distinction is to be noted between public or navigable streams and those that are private or unnavigable.

At common law, navigable or public waters are those wherein the tide ebbs and flows.⁶⁶ But while, in the United States, the common-law rule with regard to tidal waters is generally followed, this rule has been quite generally modified by the courts, and any water in this country is navigable (and therefore public) which is navigable in fact; that is, capable of transporting the products of the country in mass, or upon which general commerce may be conducted.⁶⁷ In other words the stream must be one capable of being navigated by vessels such as are usually employed in commerce (say of twenty tons burden or more) and which communicates with other states or countries, whether the tide ebbs and flows therein or not

Williams, 25 Me. 209, 43 Am. Dec. 265; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631.

⁶³American Locomotive Co. v. Hoffman, 105 Va. 343, 54 S. E. 25, 6 L. R. A. (N. S.) 252; Smith v. Agawam Canal Co., 2 Allen (Mass.) 355; Emery v. Raleigh & G. R. Co., 102 N. C. 209, 9 S. E. 139, 11 Am. St. Rep. 727; Sabine v. Johnson, 35 Wis. 185; Sullens v. Chicago, R. I. & P. Ry. Co., 74 Iowa, 659, 38 N. W. 545, 7 Am. St. Rep. 501; Dorman v. Ames, 12 Minn. 451 (Gil. 347); Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458. See Cook v. Seaboard Air Line Ry., 107 Va. 35, 57 S. E. 564, 10 L. R. A. (N. S.) 966, 122 Am. St. Rep. 825.

⁶⁴American Locomotive Co. v. Hoffman, 105 Va. 343, 54 S. E. 25, 6 L. R. A. (N. S.) 252; Sprague v. City of Worcester, 13 Gray (Mass.) 193; Bell v. McClintock, 9 Watts (Pa.) 119, 34 Am. Dec. 507; Railroad Co. v. Carr, 38 Ohio St. 448, 43 Am. Rep. 428. See, also, cases cited in the preceding note.

⁶⁵1 Tiffany, Real Prop. § 297; Gould, Waters, §§ 253, 579-623.

⁶⁶Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; McCullough v. Wall, 4 Rich. Law (S. C.) 68, 53 Am. Dec. 715; Stuart v. Clark, 2 Swan (Tenn.) 9, 58 Am. Dec. 49; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Monongahela Bridge Co. v. Kirk, 46 Pa. 112, 84 Am. Dec. 527.

⁶⁷Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

and whether directly connected with the ocean or not. All waters other than these are unnavigable and private.⁶⁸

Navigable or public tidal waters, and the beds underlying them, belong to the state and are subject to its control; that is, they belong to the whole people of the state in their sovereign capacity for the common use of the citizens, the state itself being regarded as a mere trustee.⁶⁹ Hence the Legislature cannot grant an indefeasible title thereto or to the rights therein to any private person, whether individual or corporation.⁷⁰ But in other respects the power of the state Legislature over the public rights of navigation and fishing in any waters within its bounds is unrestricted, provided it does not interfere with the exclusive power of the federal Legislature to regulate commerce under the federal Constitution.⁷¹

Subject to the limitations above mentioned, a state may by law regulate the use of fisheries, oyster beds, wharves, landings, dams, etc., within its territorial limits, though in navigable waters.⁷²

The line of private ownership is generally ordinary high-water mark, upon the seashore. Below this the land belongs to the state,

⁶⁸ *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *The Daniel Ball*, 10 Wall. 563, 19 L. Ed. 999; *Jackson v. The Magnolia*, 20 How. 296, 15 L. Ed. 909; *Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. Ed. 1058; *Waring v. Clarke*, 5 How. 441, 12 L. Ed. 226; *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112, 84 Am. Dec. 527; *People v. Canal Appraisers*, 33 N. Y. 461; *Bullock v. Wilson*, 2 Port. (Ala.) 436; *Collins v. Benbury*, 27 N. C. 118, 42 Am. Dec. 155; *State v. Black River Phosphate Co.*, 27 Fla. 276, 9 South. 205. But see *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Rep. 641; *Com. v. Chapin*, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; *Inhabitants of Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276; *Day v. Day*, 22 Md. 530. A stream, though not floatable (e. g., for logs) in its usual and continuous condition, may still be regarded as a floatable stream, and as such subject to public use, if by increased precipitation, at seasons recurring periodically with reasonable certainty, the flow of water suffices for the substantial use of the public for the transportation of the products of field or forest. *Hot Springs Lumber & Mfg. Co. v. Revercomb*, 106 Va. 176, 55 S. E. 580, 9 L. R. A. (N. S.) 894.

⁶⁹ *Newport News Shipbuilding & Dry Dock Co. v. Jones*, 105 Va. 509, 54 S. E. 314, 6 L. R. A. (N. S.) 247; *Taylor v. Com.*, 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865; *Lansing v. Smith*, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573; *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655; *Arnold v. Mundy*, 6 N. J. Law, 1, 10 Am. Dec. 356.

⁷⁰ *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.

⁷¹ *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299, 13 L. Ed. 996; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269. See *Newport News Shipbuilding & Dry Dock Co. v. Jones*, 105 Va. 509, 54 S. E. 314, 6 L. R. A. (N. S.) 247; *Taylor v. Com.*, 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865.

⁷² *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *Com. v. Vincent*, 108

subject to the right of the riparian owner to wharf out to the channel.⁷³ Upon tidal streams, the line is generally, but not always, ordinary low-water mark, subject to a like easement.⁷⁴ But with respect to navigable nontidal streams the rule differs in different states. In some, the state owns the bed from low-water line; in others, the riparian proprietors own the bed, *prima facie*, to the middle of the stream.⁷⁵

§ 57. **Same—4. Private or Unnavigable Waters.** The bed of a private or unnavigable stream belongs to the owner of the soil through which it flows. But if the banks are owned by different persons, each owns *prima facie* to the middle of the stream (*ad flum fluminis*), though this presumption may be rebutted by proof of a grant or exception of the whole bed by one of the owners to the other, or by or to their predecessors in the title.⁷⁶

§ 58. **II. Subterranean Streams.** Underground waters may assume three different characters or phases. They may consist of (1) water running in well defined and known channels beneath the ground; (2) water running in veins or channels, which cannot be traced; and (3) water running in no defined channel, but merely percolating or oozing through the land. The two last mentioned, however, are practically synonymous, and will be treated together in the following section as percolating water. The present section will be devoted to the discussion of water running in well defined and known channels.

It is well settled that subterranean waters which are gathered into sufficient volume to possess an appreciable value, and flow in a clearly defined and known channel, since it is easily practicable to avoid diverting them, are subject to the same rules as govern the use of water flowing on the surface.⁷⁷

Mass. 447; *Burnham v. Webster*, 5 Mass. 266; *Dunham v. Lamphere*, 3 Gray (Mass.) 268. See *Lewis v. Christian*, 101 Va. 135, 43 S. E. 331.

⁷³ *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224.

⁷⁴ *Tiffany*, Real Prop. § 264.

⁷⁵ *Tiffany*, Real Prop. § 265.

⁷⁶ 2 Min. Insts. 23; *Home v. Richards*, 4 Call (Va.) 441, 2 Am. Dec. 574; *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 245, 261; *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525; *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Rep. 641; *McCullough v. Wall*, 4 Rich. Law (S. C.) 68, 53 Am. Dec. 715; *Stuart v. Clark*, 2 Swan (Tenn.) 9, 58 Am. Dec. 49; *Ingram v. Threadgill*, 14 N. C. 59; *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 565, 3 Am. St. Rep. 48; *Seneca Nation of Indians v. Knight*, 23 N. Y. 498; *Muller v. Landa*, 31 Tex. 265, 98 Am. Dec. 529.

The rule stated in the text applies also in this country to those rivers whose beds are not owned by the state, but by the riparian proprietors, subject to the public right of navigation. Ante, § 56.

⁷⁷ *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747, 40 S. E. 27, 86 Am.

In limestone regions especially, streams often of great volume and power pursue their subterranean courses for great distances and then emerge from their caverns, furnishing power for machinery or supplying towns and settlements with water. To say that these streams might be obstructed or diverted merely because they run through underground channels is to forget the rights and duties of man in relation to flowing water. Such streams are subject in general to the same rules as govern surface streams.⁷⁸

§ 59. **III. Percolating Waters.** In this class, it will be remembered, fall not only those waters which merely ooze or filtrate through the soil, but also those that flow in some quantity or volume, but in undefined and unknown channels.⁷⁹

Such waters are for the most part regarded merely as a part of the land under whose surface they percolate, and fall within the general doctrine giving to the owner of land all that lies beneath the surface, whether it be solid rock, porous earth, veins or strata of stone or ore, or veins or percolations of water. In digging upon his own land for the foundations of a building, for minerals or for water, the owner of the land may appropriate for his own purposes such percolating waters; and if in the exercise of such rights he disturbs, intercepts or drains off the water collected from underground percolations in his neighbor's spring or well, the loss to the neighbor falls within the description of *damnum absque injuria*, and is in general no ground for an action or an injunction.⁸⁰

St. Rep. 924, 7 Va. Law Reg. 556; *McNab v. Robertson*, 1 App. Cas. 134; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721, note. See also, cases cited in note 78, *infra*.

⁷⁸ *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721, note; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Collins v. Chartiers Valley Gas. Co.*, 131 Pa. 143, 18 Atl. 1012, 6 L. R. A. 280, 17 Am. St. Rep. 791; *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 South. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; *Hale v. McLea*, 53 Cal. 578; *Burroughs v. Saterlee*, 67 Iowa, 396, 25 N. W. 808, 56 Am. Rep. 350; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Broadbent v. Ramsbotham*, 11 Exch. 602.

⁷⁹ *Ante*, § 58. In this connection the term "defined channel," it is said, means "a contracted and bounded channel, although the course of the stream may be undefined by human knowledge"; and the term "known" means "the knowledge by reasonable inference from existing and observed facts in the natural or pre-existing condition of the surface of the ground. 'Known,' in this rule of law, is not synonymous with 'visible,' nor is it restricted to knowledge derived from exposure of the channel by excavation." *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747, 757, 40 S. E. 27, 86 Am. St. Rep. 924, 7 Va. Law Reg. 556; 14 Mews, E. C. L. 1955.

⁸⁰ 3 Min. Insts. 18; *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747, 40 S. E. 27, 86 Am. St. Rep. 924, 7 Va. Law Reg. 556; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Acton v. Blundell*, 12 M. & W. 324; *Wheelock v. Jacobs*,

The reasons for this doctrine are obvious. The law does not give one man the right to require another's land to serve as a mere filter for his spring or well. Percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the proper and reasonable enjoyment of one's land. The difficulty, also, of ascertaining the fact of the disturbance, as well as its extent, would be insurmountable.⁸¹

But while the owner of land, in the proper and reasonable enjoyment thereof, may divert or intercept percolating water from his neighbor's well or spring, he has no right to pollute it in any way to the injury of the neighbor's water supply. If his reasonable use of his own property involves such pollution, as in case of a cess-pool, it is his duty to keep the polluted water upon his own land.⁸²

§ 60. *Ice.* The right to gather and appropriate ice formed upon rivers, ponds, etc., depends upon the ownership of the bed under the water from which it is formed. If the water is private, the ice, like the water itself, is part of the realty until severance, and belongs to the owner of the bed, and not to the owner of a mere easement of flowage.⁸³ But ice formed on public waters belongs, it

70 Vt. 162, 40 Atl. 41, 43 L. R. A. 105, 67 Am. St. Rep. 659; *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92, note; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 South. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Curtiss v. Ayrault*, 47 N. Y. 73; *Village of Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433, note; *Ocean Grove Camp Meeting Ass'n v. Asbury Park Com'rs*, 40 N. J. Eq. 447, 3 Atl. 168; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Chatfield v. Wilson*, 28 Vt. 49. If done maliciously and wantonly, it is questionable if he is to escape liability, though the better view is that this is immaterial. *Borough of Bradford v. Pickles*, [1895] App. Cas. 587; *Chatfield v. Wilson*, *supra*; *Walker v. Cronin*, 107 Mass. 556; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93. But see *Roath v. Driscoll*, *supra*; *Wheatley v. Baugh*, *supra*; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569.

⁸¹ *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721, 723, and other cases cited, *supra*.

⁸² *Tenant v. Goldwin*, 1 Salk. 360; *Humphries v. Cousins*, 2 C. P. Div. 239; *Ballard v. Tomlinson*, 29 Ch. Div. 115; *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Haugh's Appeal*, 102 Pa. 42, 48 Am. Rep. 193; *Wahle v. Reinbach*, 76 Ill. 322; 1 *Tiffany*, Real Prop. § 300.

⁸³ *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580; *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224; *Woodman v. Pitman*, 79 Me. 456, 10 Atl. 321, 1 Am. St. Rep. 342, note; *Stevens v. Kelley*, 78 Me. 445, 6 Atl. 868, 57 Am. Rep. 813; *Paine v. Woods*, 108 Mass. 172; *Howe v. Andrews*, 62 Conn. 398, 26 Atl. 394; *Bigelow v. Shaw*, 65 Mich. 341, 32 N. W. 800, 8 Am. St. Rep. 902; *Allen v. Weber*, 80 Wis. 531, 50 N. W. 514, 14 L. R. A. 361, 27 Am. St. Rep. 51.

seems, to him who first appropriates it,⁸⁴ except in those states where the bed of a navigable stream belongs to the riparian proprietors; ⁸⁵ the only public right in such streams being that of navigation.

§ 61. **Petroleum Oil and Natural Gas.** These substances, while undoubtedly partaking in some measure of the nature of minerals, and sometimes classified as such,⁸⁶ are governed with respect to their ownership by the rules governing the ownership and control of percolating waters, to which, on account of their fluid and fugitive character, they are closely analogous. Like them, oil and gas possess the power and tendency to escape from the position they occupy at a given moment.⁸⁷

In either aspect, however, they are part of the land under which they are stored, and therefore possession of the land is possession of the oil or gas, the control of which belongs to the owner of the land, and where a conveyance is made of the oil or gas the lease or deed is in effect usually to be considered a grant of part of the corpus of the estate, and not of a mere profit à prendre, at least where the grantee is thereby given the exclusive right to take the oil and gas.⁸⁸

But owing to its fugitive nature, if the oil or gas escape from the land under whose surface it is stored, and go into other land or come under another's control, the title of the former owner is lost.⁸⁹

⁸⁴ *Barrett v. Rockport Ice Co.*, 84 Me. 155, 24 Atl. 802, 16 L. R. A. 774; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Inhabitants of West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Reysen v. Roate*, 92 Wis. 543, 66 N. W. 599. But see *McFadden v. Haynes & De Witt Ice Co.*, 86 Me. 319, 29 Atl. 1068. See 1 *Tiffany, Real Prop.* § 270.

⁸⁵ 1 *Washburn, Real Prop.* (6th Ed.) § 2, note; *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229, 6 N. W. 636, 38 Am. Rep. 246.

⁸⁶ *Ante*, § 49; *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304; *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433; *Funk v. Haldeman*, 53 Pa. 229.

⁸⁷ *Kier v. Peterson*, 41 Pa. 362; *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731. See *Wood County Petroleum Co. v. West Virginia Transp. Co.*, 28 W. Va. 211, 57 Am. Rep. 659.

⁸⁸ *Stoughton's Appeal*, 88 Pa. 198, 201; *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731; *Hague v. Wheeler*, 157 Pa. 324, 27 Atl. 714, 22 L. R. A. 141, 37 Am. St. Rep. 736; *Hail v. Reed*, 15 B. Mon. (Ky.) 479; *Columbian Oil Co. v. Blake*, 13 Ind. App. 680, 42 N. E. 234. See *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 293, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645.

⁸⁹ *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433; *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731; *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304.

And if an adjoining, or even a distant, owner drills his land and taps the gas or oil deposit, so as to disturb or destroy the flow of oil or gas on the land of another, the latter has no remedy. The substances have become temporarily at least the property of the former and under his control.⁹⁰

⁹⁰ *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304; *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 433, 31 Am. St. Rep. 433; *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731.

CHAPTER III.

INCORPOREAL HEREDITAMENTS.

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§ 62. I. Annuities and Corodies. An annuity is a right to claim a certain yearly (or periodical) sum of money in fee simple, for life or for years, and chargeable only on the person of the grantor.¹

A corody is very similar in its nature to an annuity, being a right to claim a certain periodical allotment of victual and provision for one's maintenance in fee simple, for life or for years, and chargeable on the person only of the grantor.²

¹ 2 Min. Insts. 38; 1 Th. Co. Lit. 449; *Dulaney v. Dulaney*, 105 Va. 433, 54 S. E. 40. If the payment is charged on the lands of the grantor, instead of on his person, it is in the grantee's election to treat it as a rent granted, in which case it ceases to be an annuity and becomes real property. 2 Min. Insts. 38; post, § 71. But at the election of the grantee the charge upon the grantor's lands may be waived, and then it is simply an annuity, and personality only. 2 Min. Insts. 38; 2 Bl. Com. 40, note (34); 1 Th. Co. Lit. 449, 450. An annuity is also to be distinguished from an "income" or "interest" derived from the investment of a fund for one's benefit. One entitled to such "income" is taxable on the principal represented thereby, but the owner of an annuity is not. *Dulaney v. Dulaney*, supra.

² 2 Min. Insts. 37; 2 Bl. Com. 40; *Jacob*, Law Dict. Corody.

Neither of these rights is real property. They are strictly personal, but possess the peculiarity, if given to the grantee "and his heirs," of passing to the heirs of the deceased owner, and not to his personal representative, like other personal property. Hence, though personalty, they are classed as incorporeal hereditaments.³ But they are not "tenements,"⁴ and hence are not within the statute "de donis conditionalibus," converting fees conditional into fees tail,⁵ nor within the statutes of mortmain.⁶

§ 63. II. Franchises—In General. A franchise is a special right or privilege conferred on a person by grant (actual or presumed) from the government, which otherwise he could not enjoy.⁷

Numerous franchises exist in modern times, many of which have no connection whatever with real property, while others are not themselves real property. Indeed, only a very few are to be classed as realty. Thus, the right to vote is a franchise, and perhaps the most prominent instance in modern times is the right of persons to form themselves into a corporation, and the privileges conferred by the charter upon such a body; yet the first of these has no connection whatever with land, and the last no necessary connection therewith. Certainly, neither of them is in itself real property.⁸

A franchise is to be regarded as real property only when it is exercisable in or relates directly to particular land or other property real. Perhaps the most important instances of such franchises are the rights to operate (and charge toll for the operation of) a ferry, a toll road, canal, bridge, or grist mill. If such privileges are granted by the state in perpetuity to an individual, they constitute hereditaments, and upon the owner's death descend to his heir, and not to his personal representative; and they are to be assigned or transferred as real property.⁹

Thus, a ferry right is the right to carry passengers across streams or bodies of water from one point to another for a compensation. It is a franchise, and cannot be set up without a grant of the Legislature. The right does not belong inherently to the riparian proprietors, even though owning both banks or termini of the ferry,

³ 2 Min. Insts. 37, 38; Nevil's Case, 7 Co. 34b; Stafford v. Buckley, 2 Ves. Sr. 170; Turner v. Turner, Ambl. 776; Aubin v. Daly, 4 B. & Ald. 59; Radburn v. Jervis, 3 Beav. 450. See Taylor v. Martindale, 12 Sim. 158; Parsons v. Parsons, L. R. 8 Eq. 260.

⁴ Ante, §§ 4, 16.

⁵ 13 Edw. I, c. 1; 2 Bl. Com. 40, note (34); 2 Min. Insts. 38; post, § 165.

⁶ 7 Edw. I, St. 2; 2 Min. Insts. 38; 1 Th. Co. Lit. 492; post, § 874 et seq.

⁷ 2 Min. Insts. 35; 2 Washburn, Real Prop. 19; Bank of Augusta v. Earle, 13 Pet. 519, 595, 10 L. Ed. 274.

⁸ 2 Min. Insts. 35. See 1 Tiffany, Real Prop. § 5; ante, § 20.

⁹ Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co., 11 Leigh (Va.) 42, 76,

but it implies a right to land passengers on either bank.¹⁰ Nor is it necessarily coincident or synonymous with the ownership of the water on which it is exercised.¹¹

§ 64. **Same—Impairment or Rescission of Franchise.** The grant of a franchise by the state is in the nature of a contract, the obligation of which the federal Constitution prohibits the state to impair by subsequent legislation.¹²

But, notwithstanding this constitutional provision, the state authorities may alter or rescind the franchise in the following cases:

1. Where the right to alter or rescind has been expressly reserved in the grant itself or by general statutes passed prior to the grant and applicable thereto. In such cases the franchise may be terminated in accordance with the terms of the reservation.¹³

2. In case of misuser or nonuser. The proper remedy in such cases is a writ of quo warranto in the name of the state (and of the state alone), calling upon the party or corporation exercising the franchise to show by what authority or warrant he or it does so; or by a quasi criminal proceeding by an information in the nature of a quo warranto.¹⁴

3. In the exercise of the sovereign right of eminent domain. Even though there be no reservation of the right to cancel the grant, and no misuser nor nonuser of the franchise, the state may take the franchise for public purposes upon the payment of a just compensation, just as it may take other private property; or it may delegate the power of eminent domain to municipal corporations, or to quasi public corporations, such as public service corporations.¹⁵

36 Am. Dec. 374; *Gunterman v. People*, 138 Ill. 518, 28 N. E. 1067; *Trustees of Mayville v. Boon*, 2 J. J. Marsh. (Ky.) 224; *Lewis v. Intendant & Town Council of Gainesville*, 7 Ala. 85; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 60, 42 Am. Dec. 716.

¹⁰ *Peter v. Kendal*, 6 B. & Cr. 703, 13 E. C. L. 703; *Fay, Petitioner*, 15 Pick. (Mass.) 243, 254; 2 Washburn, Real Prop. 20, 21.

¹¹ *Fay, Petitioner*, 15 Pick. (Mass.) 243, 249, 253; *Mills v. St. Clair County Com'rs*, 3 Scam. (Ill.) 53.

¹² 2 Min. Insts. 35; Const. U. S. art. 1, § 10, cl. 1; *Dartmouth College v. Woodward*, 4 Wheat. 629, 4 L. Ed. 629; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Humphrey v. Pegues*, 16 Wall. 249, 21 L. Ed. 326; *Robinson v. Gardiner*, 18 Grat. (Va.) 509.

¹³ 2 Min. Insts. 36; *Pennsylvania College Cases*, 13 Wall. 190, 20 L. Ed. 550; *Miller v. New York*, 15 Wall. 478, 21 L. Ed. 98; *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 21 L. Ed. 133.

¹⁴ 2 Min. Insts. 36; Bac. Abr. Informations (A); *Newport News & O. P. Ry. & Electric Co. v. Hampton Roads Ry. & Electric Co.*, 102 Va. 795, 807, 47 S. E. 839; *Com. v. Birchett*, 2 Va. Cas. 51. But the mere negligence of the proprietor constitutes no ground of cancellation. *Peter v. Kendal*, 6 B. & Cr. 703, 13 E. C. L. 703; *Newport News & O. P. Ry. & Electric Co. v. Hampton Roads Ry. & Electric Co.*, supra.

¹⁵ 2 Min. Insts. 37; *James River & K. Co. v. Thompson*, 3 Grat. (Va.)

Thus a Legislature may authorize a bridge to be erected so as to occupy and destroy a ferry; or a railroad company or a municipal corporation may be authorized to appropriate the bridge property or milling rights of another; or one railway company may be authorized to take the franchise of another railway company, though the prior grant be ever so exclusive, provided compensation is secured to the party thus deprived of the prior franchise.¹⁶

4. In the exercise of the police power.¹⁷

§ 65. Same—Exclusiveness of Franchise. Subject to the limitations mentioned in the preceding section, the identical franchise is always exclusive, since to encroach upon it would be to impair the obligation of the contract implied in the grant thereof.

But in respect to a rival franchise, not intended to operate over the exact ground occupied by the first, but so near as to seriously affect its earning power, there is some difference of opinion as to whether the grant of the new franchise impairs the obligation of the old. The answer depends finally upon the construction placed upon the grant of the first franchise, and upon the extent of that grant.

If, for example, the grant of a ferry or bridge franchise should expressly limit the distance within which no other ferry or bridge shall be erected, the Legislature could not constitutionally authorize a second ferry or bridge within the prescribed distance, save in the exercise of eminent domain, or as described in the preceding section.¹⁸

But if there is no such limitation expressed in the grant of the first franchise, a more difficult question arises. Is the grant to be construed as intended to be exclusive as to rival franchises, as in the case just mentioned? The better opinion is that a franchise is exclusive only where it is expressly declared in the grant to be so. Monopolies are odious, and are never to be implied in a public

270; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535; *Richmond, F. & P. R. Co. v. Louisa R. Co.*, 13 How. 83, 14 L. Ed. 55; *Central Bridge Corp. v. City of Lowell*, 4 Gray (Mass.) 474; *Boston Water Power Co. v. Boston & W. R. Co.*, 23 Pick. (Mass.) 360.

¹⁶ *Richmond, F. & P. R. Co. v. Louisa R. Co.*, 13 How. 71, 83, 14 L. Ed. 55; *White River Turnpike Co. v. Vermont Cent. R. Co.*, 21 Vt. 590; *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray (Mass.) 1; *Central Bridge Corp. v. City of Lowell*, 4 Gray, 474; *Boston Water Power Co. v. Boston & W. R. Co.*, 23 Pick. (Mass.) 360.

¹⁷ *Newport News & O. P. Ry. & Electric Co. v. Hampton Roads Ry. & Electric Co.*, 102 Va. 795, 47 S. E. 839.

¹⁸ *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray (Mass.) 1; *Newburgh & C. Turnpike Road Co. v. Miller*, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274; *Dartmouth College v. Woodward*, 4 Wheat. 518, 638, 4 L. Ed. 629.

grant, being unfriendly in the main to the prosperity and convenience of society.¹⁹

§ 66. III. *Profits à Prendre and Commons*—1. *General Nature.* A profit à prendre is a right to take a part of the soil or the products of the soil from the land of another person; for example, to cut down and take away timber, to dig turf (for fuel, etc.) or coal or other minerals, to pasture one's cattle on another's land, to fish in another's waters, to take sand, gravel, or stone.²⁰ The profit à prendre is so called because it always involves the use of another's land for the purpose of obtaining a profit therefrom, in contradistinction to an easement, which involves the right of using another's land, but taking no profit therefrom, as in case of a right of way.²¹

The grant of a profit à prendre carries with it by necessary implication the right to do anything upon the land in which it is to be enjoyed that is reasonably necessary for the proper exercise of the right to take the stipulated profit. Hence, if the profit is estovers or timber, the owner of the profit à prendre may enter upon the land for the purpose of cutting and removing it;²² and one entitled to take minerals from another's land may dig and mine therein for the purpose.²³

Profits à prendre may be either exclusive of any right on the part of the owner of the land to take the same class of profit therefrom, or they may be enjoyed in common with the owner of the land, in which case they are often designated "commons." The prima facie presumption in case of all such grants is that the owner of the land does not intend to deprive himself of all enjoyment of the profits

¹⁹ 2 Min. Insts. 36; *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, 11 Leigh (Va.) 69, 36 Am. Dec. 374; *Richmond, F. & P. R. Co. v. Louisa R. Co.*, 13 How. 71, 14 L. Ed. 55; *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 7 Pick. (Mass.) 344. See *Newport News & O. P. Ry. & Electric Co. v. Hampton Roads Ry. & Electric Co.*, 102 Va. 795, 47 S. E. 839. But see 3 Kent, Com. 459; *Ogden v. Gibbons*, 4 Johns. Ch. (N. Y.) 160; *Newburgh & C. Turnpike Road Co. v. Miller*, 5 Johns. Ch. 111, 9 Am. Dec. 274.

²⁰ 2 Min. Insts. 9, 13, 15, 16; 1 Tiffany, Real Prop. § 334; 2 Bl. Com. 32; 1 Th. Co. Lit. 229, 230; 3 Kent, Com. 406 et seq.; *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; *Reg. v. Chamberlain*, 9 Ad. & El. 444.

²¹ Post, § 89; *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Huff v. McCauley*, 53 Pa. 206, 91 Am. Dec. 203.

²² *Liford's Case*, 11 Co. 52 a.

²³ *Cardigan v. Armitage*, 2 B. & Cr. 197; *Daud v. Kingscote*, 6 M. & W. 174; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 14 Am. Rep. 322; *Williams v. Gibson*, 84 Ala. 228, 4 South. 350, 5 Am. St. Rep. 368.

granted, and that the grant therefore is not exclusive; in other words, the presumption is always in favor of the grant creating a common, though this may be rebutted by a plain expression to the contrary, or perhaps in a strong case by inference from the surrounding circumstances.²⁴

A common or profit à prendre is closely analogous to an easement in most respects, and therefore a consideration of the principles applicable to one will suffice for the other also. This consideration will be postponed to the following chapter dealing specifically with easements, except as to matters wherein the common or profit à prendre is peculiar.

We shall here discuss, as briefly as may be: (1) The nature of commons, as being appurtenant to land or in gross (that is, attached to the person only of the grantee); (2) the more prominent instances of commons; and (3) the apportionment of commons.

§ 67. Same—2. Commons Annexed to Land or in Gross. Profits à prendre may pertain to land (that is, they may be annexed to land in the hands of the owner of the profit); or they may be in gross (that is, annexed merely to the person of such owner).

In the case of profits à prendre or commons appurtenant to land, the land to which the right of profit is annexed is the "dominant tenement," and the land in which the right is to be exercised or enjoyed is the "servient tenement," just as in the case of easements.²⁵

The prominent idea underlying this sort of profit à prendre is that its function and raison d'être is to supply the land to which it is appurtenant with something in which it is lacking, and therefore the extent of the right must be limited by the needs of that land, not by the personal desires or purposes of the owner thereof.

Consequently, if a right is claimed in the land of another to take therefrom all the wood, turf, etc., the claimant may desire, for purposes of sale or of use upon other land, as well as of use upon the land to which the right is claimed to be appurtenant, these facts of themselves show that such profit à prendre or common cannot be appurtenant to land, but must be in gross, if it exists at all.²⁶

²⁴ Mountjoy's Case, Co. Lit. 164 b; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Silsby v. Trotter, 29 N. J. Eq. 228; Funk v. Haldeman, 53 Pa. 229; Massot v. Moses, 3 S. C. 168, 16 Am. Rep. 697; Harlow v. Lake Superior Iron Co., 36 Mich. 105.

²⁵ Post, § 87; Phillips v. Rhodes, 7 Metc. (Mass.) 322; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715; Grubb v. Grubb, 74 Pa. 25; Huntington v. Asher, 96 N. Y. 604, 48 Am. Rep. 652.

²⁶ Bailey v. Stephens, 12 C. B. (N. S.) 91; Valentine v. Penny, Noy, 145; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715. See Huntington v. Asher, 96 N. Y. 604, 48 Am. Rep. 652.

On the other hand, if the profit à prendre or common is in gross, its extent depends altogether upon the agreement or prescriptive user of the parties, and is independent of the ownership of any land by the claimant of the right.²⁷

Important consequences depend upon whether the right is appurtenant to land or in gross. If the former, it will always pass upon a conveyance of the land, without special mention, unless expressly excepted from the operation of the conveyance; and furthermore, since the extent of the right appurtenant is, as shown above, always measured by the needs of the dominant tenement, it follows that once a common appurtenant always a common appurtenant; the profit cannot be separated from the dominant tenement by a grant thereof, reserving the land, or by a grant of the land reserving the right.²⁸ Neither of these principles has any application in the case of profits à prendre or commons in gross.

§ 68. Same—3. Instances of Profits à Prendre or Commons—

A. Common of Pasture. At common law the typical and most important of these rights was that of pasture, generally in the form of a common.²⁹ This existed under the feudal system, as an incident of the grant of lands upon feudal services, especially those of a military character; the tenant being authorized (as an implied incident of the grant) to pasture his cattle upon the waste lands of the lord, his own land being all supposed to be arable or utilized otherwise than for pasture.³⁰ It might also be created, independently of the feudal relation, but only (in such case) by express grant or prescription.³¹ In the first case, the common was termed "appendant," and was always annexed to land; in the second case, it depends upon the nature of the grant, or of the user (in case it is created by prescription) whether it is appurtenant to land or is to be deemed a right in gross.³²

The feudal law looked with favor upon the common of pasture appendant, because its existence supposed the strengthening of

²⁷ 2 Min. Insts. 13; *Welcome v. Upton*, 6 M. & W. 536; *Shuttleworth v. LeFleming*, 19 C. B. (N. S.) 687; *Pierce v. Keator*, 70 N. Y. 419, 26 Am. Rep. 612; *Youghiogheny River Coal Co. v. Pierce*, 153 Pa. 74, 25 Atl. 1026; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Cadwalader v. Bailey*, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300.

²⁸ *Drury v. Kent*, Cro. Jac. 14; *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715.

²⁹ 2 Min. Insts. 9 et seq.

³⁰ 2 Min. Insts. 10; 2 Bl. Com. 33; *Bennett v. Reeve*, Willes, 227. See ante, § 6.

³¹ 2 Min. Insts. 12; 1 Th. Co. Lit, 228, note (6); 2 Bl. Com. 33; *Cowlam v. Slack*, 15 East, 108.

³² 2 Min. Insts. 12, 13.

the barony, perhaps of the kingdom, by the introduction of a new military tenant; while it correspondingly discouraged the common of pasture appurtenant, created by mere grant or prescription, and the common in gross, because they not only did not necessarily involve the strengthening of the barony or kingdom, but might readily involve the reverse, inasmuch as the owner of the common thus acquired might be a foreigner draining the resources of the barony and kingdom.³³

The idea animating common of pasture appendant under the feudal law was that the tenant, being granted in general only arable land, all of which would be in cultivation, must be given some means of pasturing the cattle needed by him to plough and manure such land. Hence only such cattle were pasturable on the lord's waste lands by virtue of this right as would be proper for these purposes, such as horses, sheep and oxen, but not hogs or goats, though cattle not belonging to the commoner might be included if used by him;³⁴ and with respect to the number of beasts to be pastured the rule established was the so-called rule of "levancy and couchancy," meaning that so many beasts might be pastured on the servient tenement in the summer as the dominant tenement could supply food for during the winter.³⁵

On the other hand, commons appurtenant by mere grant or prescription and commons in gross depend for their existence as well as for their extent upon the terms of the grant or upon the character and extent of the user upon which the prescriptive claim is based. Hence, it follows that such commons may be annexed to other than arable lands;³⁶ that the commoner need not necessarily be confined to beasts that may be used in ploughing or manuring the land, but in the absence of express stipulation may pasture any sort of beast;³⁷ and that the number of beasts to be pastured will be regulated by the grant or prescriptive user, though if not otherwise prescribed the rule of "levancy and couchancy" will be applied.³⁸

It is to be observed that the common of pasture appendant, being an incident of feudal tenures, can exist, even in England, only where

³³ 2 Min. Insts. 12. See *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582.

³⁴ 2 Min. Insts. 10; 2 Bl. Com. 33; 1 Th. Co. Lit. 226, 227, note (R), note (S); *Bennett v. Reeve*, Willes, 227.

³⁵ 2 Min. Insts. 10, 11, 12; *Tyrringham's Case*, 4 Co. 37 b, 37 a, note (F); *Bennett v. Reeve*, Willes, 231, 232; *Benson v. Chester*, 8 T. R. 396.

³⁶ 2 Min. Insts. 12.

³⁷ 2 Min. Insts. 12; 1 Th. Co. Lit. 227; 2 Bl. Com. 33.

³⁸ 2 Min. Insts. 12; 1 Th. Co. Lit. 227, note (S).

the origin of the particular common claimed can be traced back to the times of feudal manors, not later than the time of Edward I.³⁹ In this country generally they cannot exist at all, because they are connected historically with grants to military tenants by lords of manors, of which there have been no instances with us.⁴⁰

Commons appurtenant (by grant or prescription), however, and commons in gross, may exist here, since they have no necessary connection with the feudal system, and are based entirely upon the express agreement of the parties or upon prescriptive user.⁴¹

In conclusion, the student should note that common "appendant" is confined strictly to common of pasture. Commons of other sorts may be in gross or appurtenant to land by express grant or by prescription, but there can be no implied grant of them as incident to the creation of feudal tenements.

§ 69. Same—B. Other Instances of Commons. 1. Common of estovers or botes is the right to go upon the land of another and cut timber thereon, in common with the owner of the land, for the purpose of fuel (fire-bote), of repairing houses (house-bote), of making and repairing agricultural tools (plough-bote, or cart-bote), or of making and repairing hedges or fences (hedge-bote).⁴² This right of common of estovers is to be carefully distinguished from the exclusive right of every tenant for life or years to get similar supplies in reasonable quantities, known as the tenant's right of estovers.⁴³ Especially is this distinction to be noted in cases where the enjoyment of the profit à prendre is itself exclusive, and not in common with the owner of the servient estate.

2. Common of turbary is the right of getting turf for fuel from another's land in common with him; and if the right be exclusive of the servient owner, it is still a profit à prendre, though not a common.⁴⁴ But in the nature of things such a right will rarely be in gross; it will usually be appurtenant to land, and the same is true of the common of estovers. Hence, there must be a fit relation between the enjoyment of the right and the needs of the dominant estate. Common of turbary therefore can only be appurtenant to a dwelling (and not to mere land), and the use must be confined to the commoner's own house.⁴⁵

³⁹ 2 Min. Insts. 11.

⁴⁰ 2 Min. Insts. 11.

⁴¹ 2 Min. Insts. 13.

⁴² 2 Min. Insts. 16, 17; 2 Bl. Com. 35. See *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582.

⁴³ 2 Min. Insts. 16; ante, § 39.

⁴⁴ 2 Min. Insts. 15; 3 Bl. Com. 34. See *Wilkinson v. Proud*, 11 M. & W. 33; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Massot v. Moses*, 3 S. C. 168, 16 Am. Rep. 697.

⁴⁵ 2 Min. Insts. 16; 2 Bl. Com. 34, note (26); *Tyringham's Case*, 4 Co. 37 a.

3. Common of piscary (fishing) is the right to fish in the private waters of another person in common with him. If it is an exclusive right, it is not a common, though still a profit à prendre.⁴⁶

4. Mineral rights, such as taking coal, ore, stone, sand, gravel, seaweed, oil and gas, etc., from the lands of another may be acquired in the form of a profit à prendre, which may or may not be a common;⁴⁷ the presumption, it will be remembered, being that a grant of such rights is not intended to be exclusive.⁴⁸

§ 70. **Same—4. Apportionment of Commons.** Where the dominant or the servient estate comes into the hands of several persons, and in other cases also, it sometimes becomes necessary to determine how the benefits or burdens of the common or profit à prendre are to be distributed. This is termed "apportionment."

In the solution of these questions there are two qualifying principles that must always be borne in mind: (1) That no apportionment will be made which leads to overcharging the land—that is, increasing the burden upon it; and (2) that an apportionment must not contravene the feudal policy, with which some of them are connected.⁴⁹

Thus, a profit à prendre or common in gross, authorizing an undefined taking of profits from another's land, cannot be assigned to several persons, so as to allow each to take such unlimited amount, since it would lead to overcharging the servient estate, nor could each separately take any limited amount, since there could be no measure of how much each should take.⁵⁰ If the amount of profits

⁴⁶ 2 Min. Insts. 13, 14. Public waters constitute at common law a common fishing ground for all citizens; but this is to be distinguished from a common of fishery, which exists in private waters and, in this country, in some streams which are navigable in fact, but whose beds are privately owned. Such streams are not public fishing grounds. Ante, § 56. Any one claiming an exclusive right to fish in public waters must show a grant from the commonwealth, such as is sometimes given by statute in the case of crabbing grounds, oyster beds, etc. 2 Min. Insts. 13.

The distinction between public and private waters has been noticed, ante, §§ 56, 57.

⁴⁷ 2 Min. Insts. 15; Doe v. Wood, 2 B. & Ald. 738; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955; Brown v. Spilman, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304; Baker v. Hart, 123 N. Y. 470, 25 N. E. 948, 12 L. R. A. 60; Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645; Duffield v. Rosenzweig, 144 Pa. 520, 23 Atl. 4; Clement v. Youngman, 40 Pa. 341; Smith v. Cooley, 65 Cal. 46, 2 Pac. 880.

⁴⁸ Ante, § 66. It must also be remembered that the right to dig for and take away the minerals is to be distinguished from the ownership of the minerals acquired by a conveyance of them from the fee simple owner. See ante, § 49.

⁴⁹ 2 Min. Insts. 11.

⁵⁰ Mountjoy's Case, Co. Lit. 164b; Chetham v. Williamson, 4 East, 469;

to be taken is definitely determined, this would not give each of the assignees the right to the whole of that amount, for the same reason as before, but each would be entitled to his separate proportion, unless such apportionment would overcharge the land, in which case they must unite and exercise the right in common.⁵¹

It will be remembered that the extent of a profit or common appurtenant to land is to be measured by the needs of the land, and the exercise of the right cannot go beyond those needs.⁵²

Hence, upon the assignment of the dominant tenement to several persons, or its descent upon, or devise to, several persons, the question whether the profit or common will be correspondingly apportioned or distributed among them depends upon whether this would lead to an overcharge of the servient tenement; and this in turn would depend upon the terms of the agreement creating the right of profit or common. If the grant is to be construed as providing for future increases in the amount of profits to be taken as the needs of the dominant tenement increase, there would be no undue increase of burden caused by the division of the ownership of the dominant tenement, and an apportionment would take place. Thus, where the right is "to pasture such cattle as may be kept on the dominant tenement," each assignee or other owner of part of the dominant estate is entitled to a right of pasture for such cattle as may be kept upon his part of the land.⁵³

If, on the other hand, the grant is to be construed as fixing definitely for all time, as of the date of the grant, the needs of the dominant tenement which are to be supplied from the servient, a division of the dominant estate amongst several might lead to an overcharge of the servient tenement, and if so apportionment will not be made. Thus, where one owns a dominant tenement, with a single dwelling house thereon, and is granted the right of estovers for fuel or of turbary in another's land, and the dominant tenement is afterwards divided amongst several, each of whom claim the right of fuel for the dwelling house on his part of the land, no such apportionment can be made, as it would clearly overcharge the servient land. In such case, it is said that the right is extinguished; ⁵⁴ but it is not easy to see why the assignee of that part of the

Funk v. Haldeman, 53 Pa. 229, 244; *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105, 121.

⁵¹ See cases cited *supra*.

⁵² Ante, § 67, and cases cited in note 26.

⁵³ *Co. Lit.* 122a; *Tyringham's Case*, 4 Co. 37a; *Wild's Case*, 8 Co. 78b; *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715.

⁵⁴ *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; *Bell v. Ohio & P. R. Co.*, 25 Pa. 161, 64 Am. Dec. 687.

dominant land containing the original dwelling house should not have a better right to the profit than the others, and should not therefore be entitled to enjoy it.⁵⁶

Where the servient tenement is divided amongst several alienees or coparceners, there is no difficulty in making a proper apportionment, since no increase of burden upon the servient estate would result.⁵⁶ But where the owner of the dominant tenement is the alienee of part of the servient estate, the right of common (if appurtenant by grant or prescription) is extinguished on the ground that to enforce it in its entirety would overcharge the remainder of the servient estate, and to apportion it would be contrary to the feudal policy, which, as we have seen, looked with disfavor upon such rights, as tending to weaken and dissipate the resources of the barony and, ultimately, of the kingdom.⁵⁷ Hence the courts, if they could not justly enforce such rights in their entirety, would refuse to enforce them at all.⁵⁸

The principle just enunciated applies, however, only where the owner of the dominant tenement acquires part of the servient estate by purchase; if he acquires it by descent, the law will not do the vain thing of casting the descent of the profit upon him by its own act (intended for his benefit) and then defeating it and accordingly the common or profit is apportioned.⁵⁹

Nor does the principle apply in the case of common of pasture appendant, for it was looked upon with favor by the courts, as indicating a strengthening of the feudal barony, and therefore apportionment would take place, even where part of the servient estate was purchased by the owner of the dominant tenement.⁶⁰

§ 71. IV. Rents—Different Meanings of Term "Rent." There are three distinct things to which the term "rent" may be, and is, applied. It is important that the student should learn to discriminate between these at the very outset of the discussion.

A landlord may lease land to a tenant, say for five years or in fee simple, at an annual rent of \$100. By this transaction the landlord loses (for the period of five years, or forever, as the case may be) his right to the land, acquiring in its place a right to expect of the tenant \$100 a year. The right is, or may be, an incorporeal hereditament, since it may belong to him in fee simple, and thus de-

⁵⁶ 2 Min. Insts. 16, 17.

⁵⁶ 2 Min. Insts. 11, 12, 16.

⁵⁷ Ante, § 68; 2 Min. Insts. 12.

⁵⁸ 2 Min. Insts. 12, 16, 17.

⁵⁹ 2 Min. Insts. 13; 1 Th. Co. Lit. 227; Bac. Abr. Commons (E). See Wild's Case, 8 Co. 78b.

⁶⁰ Ante, § 68; 2 Min. Insts. 11; 1 Th. Co. Lit. 217; Tyrringham's Case, 4 Co. 37a, note (F); Wild's Case, 8 Co. 78b; Bac. Abr. Common (E).

scend to his heirs upon his death, and is known as a rent. This is a rent reserved or rent proper.⁶¹ On the other hand, as the tenant pays the \$100 each year to the landlord, he is said to pay him the "rent," and the landlord pockets the "rent"; the term "rent" being used here, not as signifying the right above described, but as indicating the profit accruing from the right. In this sense, rent is not real property at all, but is merely personalty, like any other sum of money, or chose in action. In other words, while the right to expect the annual or periodical payment of a sum of money or other profit is a rent, and real property before the payment accrues, yet after it has accrued, though still called (erroneously) "rent," it is in reality only a chose in action or (if actually paid) a chattel—in either case only personal property.⁶² This confusion will be avoided if we call the second case "arrears of rent," instead of "rent."

The first instance, above mentioned, of rent reserved (or rent proper), which may be real property, and which arises where land is transferred from the lessor to the lessee for which the rent is a return or exchange, is to be carefully distinguished from the case where the owner of land, as a means of securing the payment of a debt, agrees to pay another a certain sum annually or periodically for a term of years, for life or in fee simple, charging the payment thereof upon his land. Such a transaction creates a rent granted, or an improper rent, which, in its definition, resembles a rent reserved or rent proper in all particulars save that it is not in return for the transfer of land.⁶³ But while much alike in definition, they are very dissimilar in many of their attributes and incidents.

§ 72. Definition of a Rent. A rent reserved or proper rent is defined as follows: A right to a certain profit, issuing annually or periodically out of lands and tenements corporeal, in return for land that passes.⁶⁴

On the other hand, a rent granted or improper rent is defined to be a right to a certain profit, issuing annually or periodically out of lands and tenements corporeal, where no land passes.⁶⁵

A transaction involving the periodical payment of money may be a perfectly good contract, but unless it conforms to one of the above definitions it cannot be good as a rent, and will not have all the incidents and qualities of the latter; amongst others, the right of distress will be lacking.⁶⁶

⁶¹ Post, §§ 72, 73.

⁶² Post, § 73.

⁶³ Post, §§ 72, 77, 78.

⁶⁴ 2 Min. Insts. 39; 1 Th. Co. Lit. 442; Gilbert, Rents, 9.

⁶⁵ 2 Min. Insts. 41; Gilbert, Rents, 26, 27.

⁶⁶ 2 Min. Insts. 39; 1 Th. Co. Lit. 441, note (B.); ——— v. Cooper, 3

§ 73. **Qualities of a Rent—1. A Right.** It will be remembered that a rent is a right, of which the arrears periodically accruing are merely the fruits, which constitute personal property. This is one of the instances where confusion of thought has sometimes resulted from confusion of terminology. A landlord to whom a tenant pays money due on account of his lease does not collect rent, nor does the tenant pay him rent, though each in popular language is said to do so. In such case, properly speaking, the landlord collects and the tenant pays arrears of rent; that is, the periodically accruing fruits or profits of the right belonging to the landlord by virtue of the lease.⁶⁷

In consequence of the omission to observe this obvious distinction between the incorporeal right (which may be realty) and the corporeal fruits or profits-accruing periodically therefrom, we have it laid down that no action of debt lies by the common law for the arrears of a freehold rent, reserved on a lease for life or in fee simple, during the continuance of the freehold estate out of which it issues, "because the law would not suffer a real injury to be remedied by an action merely personal."⁶⁸ Hence, special legislation was required both in England and in this country to make arrears of a freehold rent recoverable in an action of debt.⁶⁹

So in *Pollock v. Farmers' Loan & Trust Co.*⁷⁰ (the famous income tax case) the income tax law of Congress was attacked on the ground that it was a direct tax, and should have been levied as such under the federal Constitution. The court, having previously held that all taxes upon land were direct taxes, here decided that a tax upon income derived from the collection of arrears of rent from land was likewise a tax upon land, and therefore a direct tax.

§ 74. **Same—2. A Certain Profit.** In the next place the right must be to a profit; that is, something not before in esse, whether in labor, provisions, part of the annual product, money, or other thing. Hence a reservation (or more accurately an exception) of

Wils. 375; *Dean of Windsor v. Glover*, 2 Saund. 302. For example, the following incidents attach in greater or less degree to a rent, which would not attach to a mere contract. A rent is, or may be, real estate, and, if an estate of inheritance exists therein, is descendible to the heirs, while a mere contract would ordinarily go to the personal representative. A rent usually passes with the reversion, which would not ordinarily be the case with a mere contract. The arrears of rent may be recovered by the summary process of distress, while a mere contract would be enforceable by the regular and more tedious process of the courts.

⁶⁷ 2 Min. Insts. 39; ante, § 71.

⁶⁸ 2 Min. Insts. 39; 1 Rol. Abr. 595; 3 Th. Co. Lit. 270, note (U).

⁶⁹ 2 Min. Insts. 39; St. 8 Anne, c. 14.

⁷⁰ 158 U. S. 601, 635, 15 Sup. Ct. 912, 39 L. Ed. 1108.

the trees or herbage already growing on the land transferred, while good as a contract, would not constitute a rent, because not a profit; and still less would a reservation or exception of part of the land itself.⁷¹

It is also necessary, in order that the transaction be a rent, that the profit be certain—that is, of ascertained amount—or at least capable of being made certain, upon the maxim “*Id certum est quod certum reddi potest.*” Hence a reservation of labor or money, etc., without affording means of determining the amount, is not a rent; but if it were of so much money as W. shall name, or of the shearing of all the sheep on the grantor’s estate, it would be good as a rent.⁷²

§ 75. **Same—3. Issuing Periodically.** Rent must issue periodically, though it is not essential that it should issue from year to year. It is sufficient if it accrues from period to period, whether the interval be less or more than a year; for example, from month to month, from half year to half year, every quarter, every two years, etc.⁷³

But it must be payable from period to period, during the whole continuance of the grantee’s estate; otherwise, though it may be good as a contract, it cannot be a rent. Hence, if the purchase money of land is payable in instalments, but not at intervals continuing through the whole duration of the grantee’s estate, it is not a rent.⁷⁴

§ 76. **Same—4. Out of Lands and Tenements Corporeal.** A rent can only issue out of lands and tenements corporeal,⁷⁵ or from the personal property necessary for their proper enjoyment, as, for example, where a house or lodging is let already furnished.⁷⁶

⁷¹ 2 Min. Insts. 39, 40; *Moulton v. Robinson*, 27 N. H. 550; *Buckley v. Kenyon*, 10 East, 139; *Rex v. Pomfret*, 5 Maule & S. 139; *Reg. v. Westbrook*, 10 Q. B. 178.

⁷² 2 Min. Insts. 39, 40; 1 Th. Co. Lit. 440, 441; *Gilbert*, Rents, 10; 2 Ld. Raym. 1161; *Selby v. Greaves*, L. R. 3 C. P. 594; *Walsh v. Lonsdale*, 21 Ch. Div. 9; *Dutcher v. Culver*, 24 Minn. 584; *McFarlane v. Williams*, 107 Ill. 33.

⁷³ 2 Min. Insts. 40; 2 Th. Co. Lit. 414.

⁷⁴ 2 Min. Insts. 40.

⁷⁵ 2 Min. Insts. 40; *Vetter’s Appeal*, 99 Pa. 52; *Baldwin v. Walker*, 21 Conn. 168; *Lathrop v. Clewis*, 63 Ga. 282, 287; *Sutliff v. Atwood*, 15 Ohio St. 186.

⁷⁶ *Williams v. Howard*, 3 Munf. (Va.) 277; *Wickham v. Richmond Standard Steel, Spike & Iron Co.*, 107 Va. 44, 57 S. E. 647, 11 L. R. A. (N. S.) 836. In such cases the rent is said to issue out of both land and personalty in point of render, but out of the lands only in point of remedy, the recourse being to them alone to distrein. Hence, if the chattels are lost or destroyed during the term, without the tenant’s default, the rent is diminished or apportioned accordingly. *Dean of Windsor v. Glover*, 2 Saund. 303, 304; *Newton v. Wilson*, 3 Hen. & M. (Va.) 470.

Thus, if one, seised in fee simple of a way or a profit à prendre or common, should lease it for years, reserving a periodical compensation therefor, while it may be upheld as a contract, it is not a rent, because it issues out of an incorporeal, not a corporeal, hereditament.⁷⁷

§ 77. **Same—5. In Compensation or Return (Reditus).** The four qualities of rents mentioned in the preceding sections have flowed equally from the definition of rent reserved or proper rent and from that of a rent granted or improper rent.⁷⁸

The quality now to be discussed, as well as the next, belongs to the rent reserved alone, and not to the rent granted.

Rent reserved (or proper rent) supposes a transfer of land for which it is the compensation or return. Hence it is a rule of the common law that it must be reserved payable to the grantor of the land, or "his heirs," and not to a third person, for else it would not be a return for the land that has passed.⁷⁹ And not only is a reservation to a third person not good as a rent at common law, but it was altogether void, even as a contract, upon much the same grounds as was the assignment of a chose in action. For, if permitted, the reservation might be made to persons of power and influence, who might extort from the tenant more than was contracted for, thus tending to maintenance.⁸⁰ The rigor of this common-law doctrine has, it is true, been softened in modern times by the construction of the courts; but it is even now good only as a contract, not as a rent.⁸¹

Under the common-law rule, therefore, if a father seised in

⁷⁷ 2 Min. Insts. 40; Gilbert, Rents, 20 et seq.; 1 Th. Co. Lit. 441, 442. The reasons usually assigned for this doctrine are (1) that the person entitled cannot distrein for the arrears since the tenement is incorporeal; (2) that he could not at common law have a writ of assize, because the recognitors of assize could not have a view of the subject out of which the compensation would be issuing; and (3) that incorporeal hereditaments were originally created and allowed for the public good, and therefore were not deemed fit subjects of private profit. Only the first of these is satisfactory—at least, at the present day. Hence, although reversions and remainders are incorporeal, yet upon a grant of either, reserving a return or compensation, this is a proper rent; for although there can be no distress until by the termination of the particular estate the interest in reversion or remainder comes into possession, yet then the grantor of the land may distrein for all arrears not barred by limitation. 2 Min. Insts. 40; Gilbert, Rents, 21, 23; 1 Th. Co. Lit. 442.

⁷⁸ For these definitions, see ante, § 72.

⁷⁹ 2 Min. Insts. 40.

⁸⁰ 2 Min. Insts. 41; Gilbert, Rents, 54 et seq.; 1 Th. Co. Lit. 442, note (C); Bac. Abr. Rents (G); 3 Kent, Com. 463.

⁸¹ 2 Washburn, Real Prop. 8.

fee leased land, reserving the rent payable to his "son," the whole transaction was void (though now good as a contract, but not as a rent); for in such case the word "son" is not equivalent to "heirs," but the son takes as a purchaser, and is regarded as any other third person or stranger.⁸²

§ 78. **Same—6. For Land That Passes.** It is the crowning characteristic of a rent reserved or proper rent that it is in compensation or return for land that passes. Hence the transaction is not a rent (though it may be upheld as a contract), if it be a compensation not for land, but for a mere chattel, or for a right, that passes. Thus, where a disseisee releases his right in the land to his disseisor, reserving a periodical return, this does not constitute a rent.⁸³

Rents granted or improper, on the other hand, do not in general suppose the transfer of any land between the parties, but merely a charge upon the lands of the payer of the rent of a sum of money payable periodically to the payee. But they have enough of the qualities of a rent to cause them to be called by that name, and to attach to them in certain cases the right of distress.⁸⁴

§ 79. **Rents Service, Rents Charge and Rents Seck.** "Three manner of rents there be," says Littleton, "that is to say, rent service, rent charge and rent seck."⁸⁵ This classification of rents is based upon the right of distress incident thereto. Such right always attaches, as of common right, to a rent service, but in the other cases usually depends at common law for its existence upon the stipulations of the parties; it being a rent charge if there are such stipulations, and a rent seck if there be none.⁸⁶

§ 80. **Same—1. Rents Service.** A rent service is always a rent reserved upon a grant of lands, where a reversion is left in the grantor.⁸⁷ It will be seen, therefore, that a rent service arises always

⁸² Bac. Abr. Rents (G); Hobart, 130.

⁸³ 2 Min. Insts. 41; Gilbert, Rents, 26, 27; 1 Th. Co. Lit. 442.

⁸⁴ 2 Min. Insts. 41; Gilbert, Rents, 19, 20; 1 Th. Co. Lit. 705, 707; Bac. Abr. Rents (A), 2.

⁸⁵ 1 Th. Co. Lit. 442; 2 Min. Insts. 42.

⁸⁶ 2 Min. Insts. 44 et seq.; Gilbert, Rents, 14 et seq.; 1 Th. Co. Lit. 444 et seq. It will suffice to make the rent a rent charge if there appears an intent to charge the lands with distress for a sum certain. The words may be words of covenant, or license, as that "the grantee may distrein." 1 Th. Co. Lit. 459; Gilbert, Rents, 39 et seq.

⁸⁷ 2 Min. Insts. 42; Gilbert, Rents, 9, 15; 1 Th. Co. Lit. 443, 444; Bac. Abr. Rents (A). It is designated "rent service," as the old writers tell us, because it hath some corporeal service incident unto it, which at the least is fealty, and for the most part consisted originally of military services. 1 Th. Co. Lit. 442; Bac. Abr. Rents (A), 1; 2 Min. Insts. 42.

by reservation, and is always in return for the land out of which it issues; ⁸⁸ and moreover it supposes a tenure of the grantor and a reversion in him. ⁸⁹

The most important characteristic, at common law, of rents service is that the arrears are recoverable always by distress, as of common right, without any stipulation to that effect; the purpose originally being to procure the prompt rendition of the services upon which the safety of the barony, and even of the kingdom, might depend. ⁹⁰ The rule still exists, though the ancient feudal reasons for it have long since ceased to operate. The modern reason for allowing the arrears of rent service to be recovered *ex proprio vigore* by distress is for the benefit of the poorer class of tenants. ⁹¹ Thus, the right of distress, which was first introduced for the sake of the public safety, is continued for the benefit of poor tenants, the landlord's interest not being the inducing motive at either period. ⁹²

§ 81. Same—2. Rents Charge and Rents Seck. While rent service must always be a rent reserved because of the necessity for a reversion, rent charge and rent seck may be either a rent reserved or a rent granted. In case of rent reserved, if the grantor of the land transfers his entire interest therein, leaving no reversion in himself, the rent reserved thereon cannot be a rent service, but must be either a rent charge or rent seck. And so, if the rent be not a rent reserved at all, but a rent granted, it cannot be a rent service, but must be either a rent charge or a rent seck. ⁹³

Whether a rent (not a rent service) is a rent charge or a rent seck depends at common law for the most part upon the stipulations as to distress therein. No right of distress exists as a general thing in these cases at common law unless stipulated for. Wherever there is such a stipulation, the rent is a rent charge; if there is no such clause, it is a rent seck (*reditus siccus*; that is, a dry or barren rent). ⁹⁴

But there are three exceptions, even at common law, to this gen-

⁸⁸ 2 Min. Insts. 42; 1 Th. Co. Lit. 442.

⁸⁹ 2 Min. Insts. 43; 1 Th. Co. Lit. 444; 2 Bl. Com. 42.

⁹⁰ In modern times taxes are recoverable by distress for similar reasons. 2 Min. Insts. 43.

⁹¹ If the recovery of the arrears of rent is made easy and prompt, landlords are induced to admit the poorer class of tenants more readily, without demanding from them the rent in advance or collateral security for its payment; the tenant's household goods being generally security enough for at least a quarter's or a half year's rent. 2 Min. Insts. 43.

⁹² 2 Min. Insts. 43.

⁹³ 2 Min. Insts. 45 et seq.

⁹⁴ 2 Min. Insts. 44 et seq.; Gilbert, Rents, 14 et seq.; 1 Th. Co. Lit. 444 et seq.

eral principle, all of which arise in cases of rent granted, and are based probably upon the fact that there is in these cases a valuable compensation in lands for the grant of the rent. In these exceptional cases, though not cases of rent service, distress is allowed as a matter of right, independently of stipulation to that effect.⁹⁵

These three exceptional cases are: (1) Rent granted for owelty (Fr. *égalité*, equality) of partition, where in dividing land between two or more co-tenants it becomes necessary to equalize the partition by a rent granted by him who receives more of the land to him who receives less; (2) rent granted in lieu of dower, where, upon assigning dower to a widow, it is found not practicable or convenient to assign the widow her precise share of the land (in such case, she may consent to receive a rent granted in lieu of her dower or part of it, issuing out of the lands whereof she is dowable); and (3) rent granted in lieu of land, upon an exchange of lands, where the lands exchanged are of unequal value, the inequality being sought to be obviated by this means. In each of these cases rights in land are surrendered, in consideration whereof the rent is granted.⁹⁶

§ 82. Estates Which May Be Had in Rents. Since a rent reserved is a return for an interest in land transferred by the payee of the rent to the payer,⁹⁷ the interest of the payee in the rent must always be commensurate with the estate of the payer thereof in the land transferred to the latter.

Thus, if the grantor of the land transfers to the grantee a term for years therein, reserving rent, he has an estate for the same number of years in the rent that the grantee has in the land. If he conveys an estate in the land for the grantee's life, he has an estate in the compensatory rent for the grantee's life. If he conveys an estate for his own life in the land, he has an estate for his own life in the rent. If he conveys a fee simple in the land, he himself has a fee simple in the rent. And so in every case of rent reserved the measure of the estate of the grantor of the land in the rent is determined by the measure of the grantee's estate in the land conveyed.

But in the case of rent granted no land passes at all, and the estate in the rent granted depends entirely upon the intent and stipulations of the parties. One may grant a rent in fee simple, for life, or for years.

In either case, however, it is only where the owner of the rent

⁹⁵ 2 Min. Insts. 45, 46.

⁹⁶ 2 Min. Insts. 45, 46; Gilbert, Rents, 19, 20; 1 Th. Co. Lit. 705 et seq.; Bac. Abr. Rents (A), 2; Jameson v. Rixey, 94 Va. 342, 28 S. E. 861, 64 Wm. St. Rep. 726.

⁹⁷ Ante, §§ 77, 75.

has an estate of inheritance therein that a rent can be termed with accuracy an incorporeal hereditament. In the present discussion of rents attention will be confined in the main to such points as present themselves with regard to fee-simple rents, sometimes designated fee farm rents. Rents reserved upon an ordinary lease for life or for years will be discussed more fully hereafter, in connection with the chapter on Landlord and Tenant.⁹⁸

§ 83. Same—Maximum Estate in Rent Service. It will be remembered that a rent service always supposes a tenure of and a reversion in the grantor.⁹⁹

Prior to the statute *quia emptores*,¹ a fee-simple estate might have been had in a rent service, because by the original common law, even upon the grant of a fee-simple interest in lands, there remained a tenure of and a reversion in the grantor.² But the enactment of that statute altered this feudal principle, and since that date there has existed no tenure of nor reversion in the grantor of a fee simple.³ It follows, therefore, that a rent reserved upon a grant of a fee-simple interest in lands can never be a rent service.⁴

The largest estate to which a reversion is incident, which can now be had in lands is in England a fee qualified, and in the United States generally a life estate. Hence, since the estate in the rent reserved corresponds to the interest in the lands transferred, the largest estate which may now be had in a rent service is in England a fee tail, and here a life estate.⁵

§ 84. Apportionment of Rents. Most of the questions relating to the apportionment of rents reserved will be discussed in a subsequent chapter upon the relation of Landlord and Tenant.⁶ Only such will be considered here as should be presented at this point in contrast to the principles applicable to rents granted, which form the main topic of discussion at this time.

We have seen heretofore a noteworthy distinction drawn be-

⁹⁸ An estate in fee simple in a rent reserved is often termed a "ground rent." See *Willis' Ex'r v. Com.*, 97 Va. 667, 34 S. E. 460. Post, § 359 et seq.

⁹⁹ Ante, § 80.

¹ Ante, § 5.

² Ante, § 5; 2 Min. Insts. 54.

³ Ante, § 5; 2 Min. Insts. 54; 2 Washburn, Real Prop. 6, 7.

⁴ 2 Min. Insts. 54.

⁵ 2 Min. Insts. 54; ante, § 88. A rent service, therefore, can never be with us a strict hereditament. But a rent reserved upon a grant of lands in fee simple is a hereditament. It is simply not a rent service, because there is no reversion, but must always be either a rent charge or rent seck. Rents reserved upon the grant of a fee simple interest in the land are often designated ground rents. See *Willis' Ex'r v. Com.*, 97 Va. 667, 34 S. E. 460.

⁶ Post, § 365 et seq.

tween commons of pasture appendant and commons appurtenant by express grant or prescription, in regard to the amount of favor shown them, respectively, in the matter of their apportionment when part of the servient tenement is purchased by the owner of the dominant tenement.⁷

The same distinction exists, and for the same feudal reasons, between rents reserved and rents granted. The existence of a rent reserved, like that of a common appendant, originally indicated the introduction of a new tenant into the feud, perhaps into the kingdom, and the consequent strengthening of the military force; whereas rent granted, like common appurtenant, implied nothing of the sort, but rather a weakening of the feudal resources of the barony or the kingdom.

Hence, in the case of rent reserved, as in the case of common appendant, the law looked with favor upon the transaction, and would enforce it in its entirety or modify it as justice dictated; while rent granted, like common appurtenant, would be extinguished altogether, if it should become unjust to enforce it in its entirety.⁸

Thus, if the recipient of a rent reserved purchase a part of the land out of which it issues, the rent, being a return for the land transferred, is apportioned; that is, it is extinguished *pro rata* only.⁹ But if it be a rent granted, and the recipient of the rent purchases any part of the premises out of which it issues, the rent is altogether extinct, not only as a rent, but as an annuity also, though previously it might have been treated, at the grantee's election, in either light.¹⁰

So, according to the weight of opinion, at common law, if the holder of a rent granted should release part of the rent to the grantor thereof, the residue of the rent is wholly discharged, and there

⁷ Ante, §§ 68, 70.

⁸ 2 Min. Insts. 54.

⁹ 2 Min. Insts. 55, 58; 1 Th. Co. Lit. 466; Gilbert, Rents, 179. But if the rent be an entire thing and incapable of apportionment as where the rent consists of one horse per year or the defense of a fortress, no apportionment can take place. In such case, whether the rent is to be wholly paid or wholly extinguished depends upon whether the purpose of the rent is *pro bono publico*. If for the public good, it must be carried out in its entirety; if not, it need not be paid at all. 2 Min. Insts. 56, 60; 1 Th. Co. Lit. 471, 472; Gilbert, Rents, 165, 166.

¹⁰ 2 Min. Insts. 55, 56; 1 Th. Co. Lit. 463 et seq.; Bac. Abr. Rents (M); Gilbert, Rents, 152 et seq. But this applies only where the holder of the rent purchases part of the land by his own act. If he acquires it by descent (an act of the law) the rent will be apportioned *pro tanto*. 2 Min. Insts. 57; 1 Th. Co. Lit. 463, 464, 466, 474; Gilbert, Rents, 151 et seq.; Bac. Abr. Rents (M). See ante, § 70.

is no apportionment;¹¹ while the opposite is true if the rent thus released be a rent reserved.¹²

On the other hand, since a rent granted is not a return for the land out of which it issues, the mere fact that the grantor of the rent is subsequently evicted from part or all of the land by title paramount,¹³ or that the lands, or the buildings thereon, are destroyed in whole or in part,¹⁴ affords no ground to abate the rent, since the land was not the consideration for the rent. The whole rent must be paid, without abatement.

But in the case of rent reserved the eviction of the lessee by a stranger claiming under superior title is a ground for the abatement of the rent *pro tanto*;¹⁵ while an eviction of the tenant by the lessor from any part of the land, however small, causes a suspension of the whole rent till such part be restored to him.¹⁶

If the leased premises, or part thereof, or the buildings thereon, are destroyed, as by fire, earthquake, submergence by water, and the like, the effect thereof upon the tenant's obligation for the rent is important. The general principle of the common law is that, when a tenant leases property, he buys it (so to speak) for the term of the lease. It is his during that period, and ceases in the main to belong to the lessor. Hence any loss that occurs falls upon the tenant, who continues bound for the stipulated rent (which in this view is merely the purchase price of the premises), regardless of how valueless the premises may subsequently become to him. This view is adopted in full by the common law, so far as relates to the destruction in whole or in part of buildings and structures upon the land leased. There is no abatement of the rent, but the whole is to be paid, partly for the reason just mentioned, and partly, also, because it is necessary to stimulate the tenant to the proper care of the premises, and to guard against frauds which the lessor would often not be in a condition to establish. If the lessee means to decline such responsibility, he must at common law so stipulate in his lease.¹⁷

¹¹ 2 Washburn, Real Prop. 17, 18; Tud. Lead. Cas. 197. But see 2 Min. Insts. 56.

¹² 2 Min. Insts. 58; 1 Th. Co. Lit. 467, note (E, 1); *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337; Tud. Lead. Cas. 196.

¹³ 2 Min. Insts. 59; 1 Th. Co. Lit. 467.

¹⁴ 1 Th. Co. Lit. 468.

¹⁵ 2 Min. Insts. 58; 1 Th. Co. Lit. 468. See post, § 366.

¹⁶ 2 Min. Insts. 56; 1 Th. Co. Lit. 470, note (H, 1); *Gilbert, Rents*, 178; *Briggs v. Hall*, 4 Leigh (Va.) 484, 26 Am. Dec. 326; *Linton v. Hart*, 25 Pa 193, 64 Am. Dec. 691. See post, § 366.

¹⁷ 2 Min. Insts. 59, 60; 1 Th. Co. Lit. 469, note (G, 1); *Ross v. Overton*, 3 Call (Va.) 309, 2 Am. Dec. 552.

On account of the hardship of the case, however, the common law excepted from this principle the case where the leased land itself, or part thereof, was destroyed, as by earthquake or the submergence by water, holding that the rent must in such case be extinguished *pro tanto*.¹⁸

It should be noted that in this country the common law upon this subject has been largely modified by statute.

¹⁸ 2 Min. Insts. 58; 1 Th. Co. Lit. 469, note (G, 1); Gilbert, Rents, 187.

CHAPTER IV.

INCORPOREAL HEREDITAMENTS, CONTINUED—V. EASEMENTS.

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§ 85. I. Nature of Easements. Easements correspond to the “servitudes” of the civil law, and consist of rights (variously acquired) on the part of one person either (1) to use the land of another

(the servient tract) in a particular manner and for a particular purpose, or (2) to compel the owner of the servient tract to refrain from certain uses of his own land; the rights in either case not being inconsistent with a general property in the owner of the servient tract. Instances are rights of way, of drainage, of light and air, etc.¹

§ 86. **Same—Easements in Gross.** It would seem upon principle that one, in some instances at least, might be capable of purchasing a right of using another's land for purposes personal to the purchaser and independent of his ownership of particular land, as in the case of the purchase of a burial lot in a cemetery or a pew; and, indeed, the possibility of such an interest in another's land is quite generally admitted in this country. Such an easement is called an easement in gross.² Even in this country, however, there is much dispute as to whether an easement in gross is to be regarded as such an interest in land as that it can be transferred to another or be inherited by the heirs of the owner upon his death. But if there can be such an interest in land as an easement in gross, by the weight of reason at least (if not of authority) it should be so transferable and inheritable, provided, of course, it does not lead to overburdening the servient land.³

But, in any event, the instances of such easements are so few that a presumption may well exist that easements are intended to be created appurtenant to land, until the contrary is established.⁴

§ 87. **Same—Easements Appurtenant to Land.** By far the greater number of easements are found appurtenant to land, a domi-

¹ 2 Min. Insts. 24; 2 Washburn, Real Prop. 25; 3 Kent, Com. 434 et seq. See *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676; *Hazelton v. Putnam*, 3 Pin. (Wis.) 107, 54 Am. Dec. 158, 161; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72, 89.

² *French v. Williams*, 82 Va. 462, 4 S. E. 591; *Amidon v. Harris*, 113 Mass. 59; *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 90 Am. Dec. 161; *Mayor, etc., of City of New York v. Dow*, 125 N. Y. 380, 26 N. E. 471; *Willoughby v. Lawrence*, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758; *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354. See post, § 121. But in England the existence of easements in gross has been denied, it being there held that every easement must be appurtenant to some dominant tract. *Ackroyd v. Smith*, 10 C. B. 164; *Rangeley v. Midland Ry. Co.*, 3 Ch. App. 306.

³ *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 90 Am. Dec. 161; *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352; *Poull v. Mockley*, 33 Wis. 482. But see *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Fisher v. Fair*, 34 S. C. 203, 13 S. E. 470, 14 L. R. A. 333; *Boatman v. Lasley*, 23 Ohio St. 614; *Garrison v. Rudd*, 19 Ill. 559; *Cadwalader v. Bailey*, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300.

⁴ *French v. Williams*, 82 Va. 462, 4 S. E. 591; *Dennis v. Wilson*, 107 Mass. 591; *Cadwalader v. Bailey*, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300; *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Louisville & N. R. Co. v. Koebel*, 104 Ill. 455.

nant tenement, without which, indeed, many of them could not be created at all. Their very existence supposes a dominant tract, as in the case of drip, drainage, etc. It is this circumstance that has sometimes led to the denial of the existence of such an interest as an easement in gross.

It is a general principle controlling easements appurtenant to land that the measure of the enjoyment of the easement is the needs of the land to which it is appurtenant, just as in the corresponding case of a *profit à prendre* appurtenant to land, and therefore it can be used for no purpose which does not conduce to the benefit of the dominant tract.⁵ Hence, if one acquires a right of way over another's land, appurtenant to a particular dominant tenement only, he has the right to use such way only for the purpose of going to or from that tract. He cannot use it to reach other tracts; such use not being beneficial to the dominant tract.⁶ Hence, in a grant of a right of way, it is expedient to extend the "dominant tract" so as to take in all places to which the grantee is likely to desire to go, which may be accomplished best, perhaps, by stipulating for the right of way to the place designated "and to all places between and beyond."⁷

While, according to the better opinion, as has been shown in the preceding section, easements may be created in gross, they must be so created *ab initio*. An easement appurtenant to land cannot be converted into an easement in gross by any attempted separation of the ownership of the easement and of the dominant tenement, as by a conveyance of the dominant estate, the owner reserving or excepting the easement, or vice versa. Such an attempt avails nothing.⁸ The easement, notwithstanding, continues to adhere to the dominant estate to which it is appurtenant, and passes with it to the grantee thereof, though not specially mentioned. Once appurtenant, it is always appurtenant.⁹

⁵ *Ackroyd v. Smith*, 10 C. B. 164; *Hill v. Tupper*, 2 Hurl. & C. 121; *Linthicum v. Ray*, 9 Wall. 241, 19 L. Ed. 657; *Whaley v. Stevens*, 27 S. C. 549, 4 S. E. 145; *Moore v. Crose*, 43 Ind. 30. See ante, §§ 67, 70.

⁶ 2 Min. Insts. 19; *Lawton v. Ward*, 1 Ld. Raym. 75; *Ackroyd v. Smith*, 10 C. B. 164; and other cases cited *supra*.

⁷ 2 Min. Insts. 19. See *Perry v. Penn. R. Co.*, 55 N. J. Law, 178, 26 Atl. 829; *French v. Williams*, 82 Va. 462, 4 S. E. 591.

⁸ *Ackroyd v. Smith*, 10 C. B. 164; *Cadwalader v. Bailey*, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300; *Moore v. Crose*, 43 Ind. 30.

⁹ *Voorhees v. Burchard*, 55 N. Y. 98; *Moore v. Crose*, 43 Ind. 30; *Barnes v. Lloyd*, 112 Mass. 224; *Rhea v. Forsyth*, 37 Pa. 503, 78 Am. Dec. 441; *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338; *Shields v. Titus*, 46 Ohio St. 528, 22 N. E. 717; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503; *Taylor v. Dyches*, 69 Ga. 455; *Spaulding v. Abbot*, 55 N. H. 423. See *Scott v. Moore*, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749.

§ 88. **Same—Quasi Easements.** It is a general principle of the law that one cannot have an easement in his own land; the full and complete ownership swallowing up and merging the mere right to use it in one particular way.¹⁰ But the owner of land may have been accustomed during his ownership to use one part of the land in order to confer a benefit upon another part, as by establishing a drain, an aqueduct, a roadway, etc. While this does not of itself constitute an easement, so long as the two tracts remain in the same hands, it may, under certain conditions presently to be examined,¹¹ create an easement when the two tracts come into the possession of separate parties. Meanwhile, and until such a separation of ownership takes place, it is convenient to designate the relation between the two tracts as a potential or quasi easement; that is, a connection that is liable to become a true easement upon the severance of the possession of the respective tracts.

§ 89. **Same—Easements Distinguished from Profits à Prendre.** An easement differs from a profit à prendre in that a profit à prendre always supposes the right to take some corporeal profit from the lands of another,¹² while an easement merely confers a right to use another's land, or to compel the latter to abstain from using it in a particular way, without taking any corporeal profit therefrom.¹³

Thus the easements of passage, drainage, drip, support, etc., do not suppose the taking of corporeal substance or profit from the servient estate, but the right to take fish from another's waters, or herbage, clay, gravel, mineral, etc., from his land, these being corporeal substances, is a profit à prendre.¹⁴

§ 90. **Same—Easements Distinguished from Licenses.** A chapter will be presently devoted to licenses, their nature and incidents. It is sufficient for present purposes to point out that a license differs very materially from an easement, in that it constitutes no interest in land whatever, and is not real estate, but is a mere authority, usually revocable at pleasure and not transferable, to do a certain act or series of acts, for example, to hunt, upon the lands of another, without conferring any interest in the land itself.¹⁵ On the other

¹⁰ 2 Min. Insts. 20; 2 Washburn, Real Prop. 26; *Atwater v. Boßfish*, 11 Gray (Mass.) 150; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Capron v. Greenway*, 74 Md. 289, 22 Atl. 269; *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732; *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353; *Ritger v. Parker*, 8 Cush. (Mass.) 145, 54 Am. Dec. 744.

¹¹ Post, §§ 97, 100.

¹² Ante, § 66.

¹³ 2 Washburn, Real Prop. 26.

¹⁴ 2 Washburn, Real Prop. 26; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; *Boston Water Power Co. v. Boston & W. R. Corp.*, 16 Pick. (Mass.) 512, 522.

¹⁵ Post, § 122 et seq.; 2 Min. Insts. 28.

hand, an easement is the very opposite of this, being an interest in land, which is usually irrevocable and freely transferable in connection with the dominant tenement, as other interests in land are, subject to the same limitations.¹⁶

§ 91. II. Modes of Acquiring Easements—Enumeration. Easements may arise: (1) By natural right; (2) by express grant; (3) by express reservation or exception; (4) by implied grant; (5) by implied reservation; (6) by prescription; (7) by estoppel.

§ 92. 1. Easements Acquired by Natural Right. There are certain easements in land which pertain to adjacent land as a matter of right, without any grant, prescription or reservation being necessary to their creation. Such is the right to support of land by adjacent or subjacent land,¹⁷ and the right to the natural drainage of the surface water collected upon one's land over and into the adjacent lands of another,¹⁸ etc.

§ 93. 2. Easements Acquired by Express Grant. Easements, like other incorporeal hereditaments, at common law were said to "lie in grant"; that is, could in general be created and transferred only by deed, a writing under seal—a form of conveyance known to the common law as a "grant."¹⁹ This principle applies, even though the easement be for a term of years, however short, or an estate at will;²⁰ and it still applies in this country, it would seem, notwithstanding the statutes of conveyances, which generally provide that "no estate of inheritance, nor of freehold, or for a term of more than [so many] years, in lands, shall be conveyed unless by deed or will"; for while, under this statute, an oral conveyance of land for a term of five years or less will be good, an oral grant of an easement for the same or greater period is generally regarded as creating only a license.²¹

¹⁶ 2 Min. Insts. 28.

¹⁷ Post, § 113; 2 Min. Insts. 24.

¹⁸ Post, § 119.

¹⁹ Wood v. Leadbitter, 13 M. & W. 842; Somerset v. Fogwell, 5 B. & Cr. 875; Dyer v. Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; Morse v. Copeland, 2 Gray (Mass.) 302; Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484; ~~Huff~~ v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; Thompson v. Gregory, 4 Johns. (N. Y.) 81, 4 Am. Dec. 255; Cagle v. Parker, 97 N. C. 271, 2 S. E. 76; Veghte v. Raritan Water Power Co., 19 N. J. Eq. 142. If the interest in the easement is a permanent one in fee simple, as it will ordinarily be presumed to be in the absence of evidence to the contrary, the rule of the common law is as strict as it is in the conveyance of land in requiring the use of the word "heirs." Bean v. French, 140 Mass. 229, 3 N. E. 206; post, § 140.

²⁰ See cases cited supra.

²¹ Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; Harris v. Miller, Meigs (Tenn.) 158, 33 Am. Dec. 138; Bonelli v. Blakemore, 66 Miss. 136, 5 South. 228, 14 Am. St. Rep. 550; Banghart v. Flummerfelt, 43 N. J. Law, 28; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. 216; Rice v. Roberts, 24 Wis. 461, 1 Am. Rep.

So long as the instrument creating the easement is a writing under seal, the form of it is immaterial, provided the intent appears clearly. Thus it may be in the form of a covenant,²² or in the form of a mere license or authority.²³

It is worthy of note, also, that in equity at least a contract for the creation of an easement, like a contract for the conveyance of land, will be specifically enforced and of itself creates an equitable easement; and this is true though the contract be not under seal, and even though it be merely oral, if it has been partly performed by the proposed grantee of the easement in such manner that the breach of the contract cannot be compensated for in mere damages.²⁴

Where an easement is thus expressly created, its use and enjoyment must be confined to the terms and purposes of the grant or reservation creating it. If granted in general terms, without particularly specifying the mode of enjoyment, it may be used in any manner and for any purpose reasonably within the terms of its creation or reasonably necessary. Thus, where an alley way between two houses is expressly reserved, without specifying its mode of enjoyment, though it be not used as a passway, the use of it as a source of light and air is a common and ordinary use of such alleys, and reasonably within the terms of the grant, and the continued failure to use it as a passway was held not to constitute an abandonment of the easement.²⁵

195; *Wilmington Water Power Co. v. Evans*, 166 Ill. 548, 46 N. E. 1083. But see *Parkhurst v. Van Cortland*, 14 Johns. (N. Y.) 15, 7 Am. Dec. 427; *Van Horn v. Clark*, 56 N. J. Eq. 476, 40 Atl. 203; *Pierce v. Cleland*, 133 Pa. 189, 19 Atl. 352, 7 L. R. A. 752; *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574—in which cases, however, the easement or license had been acted on by the licensee, who had been thus put to expense and could not be placed in statu quo. This was held to make the license irrevocable, practically amounting to an easement. See post, § 126.

²² *Rowbotham v. Wilson*, 8 H. L. Cas. 348, 362; *Ladd v. Boston*, 151 Mass. 585, 24 N. E. 858, 21 Am. St. Rep. 481; *Wetmore v. Bruce*, 118 N. Y. 319, 23 N. E. 303; *Warren v. Syme*, 7 W. Va. 475; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Willoughby v. Lawrence*, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758; *Norfleet v. Cromwell*, 64 N. C. 1; 2 *Washburn*, Real Prop. 28.

²³ See 1 Th. Co. Lit. 459; *Gilbert*, Rents, 39 et seq.

²⁴ See *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; *Miller v. Brown*, 33 Ohio St. 547; *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. 753; *Wickersham v. Orr*, 9 Iowa, 253, 74 Am. Dec. 348; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632; *Rawson v. Bell*, 46 Ga. 19. The general doctrines touching the equitable title to real property created by a contract in writing under the statute of frauds, and by an oral contract partly performed are considered elsewhere. Ante, § 18.

²⁵ *Watts v. C. I. Johnson & Bowman Real Estate Corp.*, 105 Va. 519, 525, 54 S. E. 317.

§ 94. 3. **Easements Acquired by Express Reservation or Exception.** In England the terms "reservation" and "exception" are separate and distinct in meaning, the term "reservation" being applied to those provisions in a conveyance which call for the return to the grantor of some profit to issue in future out of the land conveyed, as a part of the future crops grown on the land, or a money rent, etc., the most usual instance being that of the reservation of a rent in a lease of land; while the term "exception" applies to those provisions which except from the operation of the conveyance certain parts (already existent) of the thing conveyed, which without such exception would pass under the general terms of the conveyance, as where one conveys lands, excepting the trees growing thereon, or excepting certain buildings, or the growing crops, etc.²⁶

An easement, being in strictness neither a profit issuing from the land nor itself a part of the servient tenement, cannot therefore arise in England in either of these ways, and it becomes necessary there in such cases to fall back upon the fiction of a regrant of the easement by the grantee of the land to the grantor—that is, if both parties have signed the conveyance, the theory is that the conveyance operates first as a grant to the grantee of all interest in the land, and secondly as an immediate grant back to the grantor by such grantee of the easement described.²⁷

But in the United States very generally the logical and historical significance of these terms has been lost sight of, and they are used almost interchangeably, or rather the courts, without regard to the particular terms used in the conveyance, construe the language as an exception or reservation, according to the character of right intended to be created thereby—as a "reservation" if the right should properly arise by reservation, and as an "exception" if that be the proper means of creating the right intended.²⁸

²⁶ Post, § 144; Co. Litt. 21a, 47a; Sheppard's Touchstone, 77, 80; Doe v. Lock, 2 Ad. & E. 743; Durham & S. R. Co. v. Walker, 2 Q. B. 940; Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co. (C. C.) 13 Fed. 646; King v. Wells, 94 N. C. 344; Brown v. Allen, 43 Me. 590; Cornell v. Todd, 2 Denio (N. Y.) 130; Shoenberger v. Lyon, 7 Watts & S. (Pa.) 184; Hefin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Putnam v. Tuttle, 10 Gray (Mass.) 48. See Butcher v. Creel, 9 Grat. (Va.) 201.

²⁷ 1 Tiffany, Real Prop. § 316; Durham & S. Ry. Co. v. Walker, 2 Q. B. 940; Wickham v. Hawker, 7 M. & W. 63; Corporation of London v. Riggs, 13 Ch. Div. 798.

²⁸ Engel v. Ayer, 85 Me. 453, 27 Atl. 352; White v. New York & N. E. R. Co., 156 Mass. 181, 30 N. E. 612; Hagerty v. Lee, 54 N. J. Law, 580, 25 Atl. 319, 20 L. R. A. 631; Whitaker v. Brown, 46 Pa. 197; Coal Creek Min. Co. v. Heck, 15 Lea (Tenn.) 497; Watkins v. Tucker, 84 Tex. 428, 19 S. W. 570; Sloan v. Lawrence Furnace Co., 29 Ohio St. 568.

Indeed, the courts of this country have gone still further, and have held that easements, though strictly speaking not susceptible of creation by either of these means if their original significance be preserved, may arise by reservation, thus modifying this term so that it may create rights of use in the land conveyed as well as right of profit therein;²⁹ and even though called an "exception" it will be construed as a "reservation," so as not to defeat the easement.³⁰ Hence, in this country, there is no need to resort to the theory of a regrant of the easement in such cases, and therefore no necessity that the conveyance should be signed by both parties, in order that an easement be created; the signature of the grantor alone being sufficient.³¹

§ 95. 4. Easements Acquired by Implied Grant. The foundation principle upon which rests the creation of easements by implied grant is to be found in the maxim, "*Cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa non potuit*," meaning that a grant of land or other property carries with it, by implication, as incident thereto, everything reasonably necessary to the enjoyment of the thing granted, which it is in the power of the grantor to bestow.³²

Easements arising thus by implied grant divide themselves into two classes: (1) Easements arising by necessity; and (2) easements arising from quasi easements upon a grant of the quasi dominant tenement.

§ 96. Same—A. Easements by Necessity. Easements are sometimes implied upon a grant of land, because without them the property granted could not be used by the grantee, or could not be used for the purpose for which it was granted. Such easements are said

²⁹ *Simpson v. Boston & M. R. Co.*, 176 Mass. 359, 57 N. E. 674; *Clafin v. Boston & A. R. Co.*, 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; *Chappell v. New York, N. H. & H. R. Co.*, 62 Conn. 195, 24 Atl. 997, 17 L. R. A. 420; *Grafton v. Moir*, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. Rep. 533; *Kister v. Reeser*, 98 Pa. 1, 42 Am. Rep. 608; *Engel v. Ayer*, 85 Me. 453, 27 Atl. 352.

³⁰ See *Clafin v. Boston & A. R. Co.*, 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307; and cases cited *supra*.

³¹ *Clafin v. Boston & A. R. Co.*, 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; *Bowen v. Conner*, 6 Cush. (Mass.) 132; *Kent v. Waite*, 10 Pick. (Mass.) 138; *Rose v. Bunn*, 21 N. Y. 275; *Borst v. Emple*, 5 N. Y. 33; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307; *Tuttle v. Walker*, 46 Me. 280; *Hagerty v. Lee*, 54 N. J. Law, 580, 25 Atl. 319, 20 L. R. A. 631; *Haggerty v. Lee*, 50 N. J. Eq. 464, 26 Atl. 537; *Kister v. Reeser*, 98 Pa. 1, 42 Am. Rep. 608; *Richardson v. Clements*, 89 Pa. 503, 33 Am. Rep. 784; *Kuecken v. Voltz*, 110 Ill. 264.

³² 2 Min. Insts. 19, 27; *Scott v. Moore*, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749.

to arise by necessity—that is, by a necessary inference—since otherwise the whole grant would be nugatory.³³

Thus, if one sells land to be used for a factory, retaining adjoining land, he impliedly grants such an easement in respect to the pollution of water or of air as is reasonably necessary for that particular mode of using the land granted.³⁴

But the most usual and important of these easements is the right of way by necessity, which arises where one conveys to another land, which is either entirely surrounded by the lands of the grantor, or else is bordered in part by the land of a stranger and in part by the lands of the grantor. In either case the grantee of the land, even in the absence of express stipulation, has a way by necessity over the grantor's land, since otherwise the land granted to him would be unapproachable and useless. The grantor cannot take advantage of the absence of stipulation thus to derogate from his own grant.³⁵

It is important to observe in case of the implied grant of a way by necessity that the necessity referred to is the subjective necessity of the inference that the parties so intended at the time of the grant, not the objective necessity to make the land profitable or useful. Hence, if the land granted is at the time surrounded on all sides by the lands of strangers, over which the grantor has no power or control, no right of way can arise in favor of the grantee by necessity, because neither the implied nor express grant of the grantor could give the grantee any rights over the lands of third persons.³⁶ Therefore it is a general rule governing ways by necessity that in order to establish such a way it is essential that the alleged dominant and servient tenements should be proved at some time in the past to have belonged to the same person.³⁷ For the same reason the kind of

³³ 2 Min. Insts. 19; *Bond v. Willis*, 84 Va. 796, 6 S. E. 136.

³⁴ *Hall v. Lund*, 1 Hurl. & C. 676; *Aldin v. Clark*, [1894] 2 Ch. 437. So, upon a grant of land for a building, the grantor impliedly grants also such support as may be reasonably necessary. *Siddons v. Short*, 2 C. P. Div. 572; *Rigby v. Bennett*, 21 Ch. Div. 559.

³⁵ 2 Min. Insts. 19; *Liford's Case*, 11 Co. 52a; *Pomfret v. Ricroft*, 1 Saund. 322b, note (5), (6); *Pinnington v. Galland*, 9 Exch. 1; *Bond v. Willis*, 84 Va. 796, 6 S. E. 136; *Linkenhoker v. Graybill*, 80 Va. 838; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 303; *Leonard v. Leonard*, 2 Allen (Mass.) 543; *Kimball v. Cochecho R. R.*, 27 N. H. 448, 59 Am. Dec. 387.

³⁶ See *Bullard v. Harrison*, 4 M. & S. 387; *Tracy v. Atherton*, 35 Vt. 52, 82 Am. Dec. 621; *Ellis v. Blue Mountain Forest Ass'n*, 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570.

³⁷ *Proctor v. Hodgson*, 10 Exch. 824; *Bullard v. Harrison*, 4 M. & S. 387; *Ellis v. Blue Mountain Forest Ass'n*, 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570; *Whitehouse v. Cummings*, 83 Me. 98, 21 Atl. 743, 23 Am. St. Rep. 756; *Tracy v. Atherton*, 35 Vt. 52, 82 Am. Dec. 621; *Brice v. Randall*, 7 Gill & J. (Md.) 349; *Stewart v. Hartman*, 46 Ind. 331.

way, and the sort and quantity of traffic over it, as measured by the reasonable necessities and enjoyment of the land, are to be determined by the condition and mode of enjoyment and use of the land at the time of the grant of the dominant estate, not the condition and mode of use thereof at a later period.³⁸

In the case of ways by necessity, it is the intention of the parties that is sought to be inferred from the uselessness of the land to the grantee (unless such a right of way is implied). Whether degrees of uselessness may be admitted as a ground of determining this intention is a question upon which the courts are divided. Upon principle it would seem that, if there already be another mode of access to the land, though much less convenient, or more expensive to develop, the reason for the inference of a grant of a way by necessity ceases.³⁹

In the enjoyment of a way, by necessity or by other implication, the route to be followed is in the first instance to be determined by the owner of the servient estate, for the claimant of the easement is bound to exercise his right so as to occasion the least possible injury or inconvenience to the owner of the servient tract. All he can claim is that the way be reasonably convenient. But if the servient owner neglects or refuses to locate the way, the owner of the easement may do so, subject to the restraint just mentioned, and he cannot then be held liable as a trespasser for passing over the servient land.⁴⁰

§ 97. Same—B. Quasi Easements Converted into Easements. We have seen that, while no one can have a real easement in his own land, he may be accustomed to utilize part of his land for the

³⁸ *Corporation of London v. Riggs*, 13 Ch. Div. 798; *Feoffees of Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture*, 174 Mass. 572, 55 N. E. 462.

³⁹ *Dodd v. Burchell*, 1 Hurl. & C. 113; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 303; *Hall v. McLeod*, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; *Whitehouse v. Cummings*, 83 Me. 98, 21 Atl. 743, 23 Am. St. Rep. 756; *Valley Falls Co. v. Dolan*, 9 R. I. 489; *Field v. Mark*, 125 Mo. 502, 28 S. W. 1004. But under some decisions a way by necessity will be implied, if the other access involves disproportionate labor or expense. See *Feoffees of Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture*, 174 Mass. 572, 55 N. E. 462; *Pettingill v. Porter*, 8 Allen (Mass.) 1, 85 Am. Dec. 671; *Smith v. Griffin*, 14 Colo. 429, 23 Pac. 905. But if, though another access exists or may be created, it is insufficient or not available for the general uses to which the land is to be put within the contemplation of the parties, the reasons for the inference of a grant of a way by necessity apply with full force. *Myers v. Dunn*, 49 Conn. 71; *Feoffees of Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture*, supra; *Hildreth v. Googins*, 91 Me. 227, 39 Atl. 550.

⁴⁰ 2 Washburn, Real Prop. 51; *Russell v. Jackson*, 2 Pick. (Mass.) 574, 578; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Smiles v. Hastings*, 24 Barb. (N. Y.) 44.

benefit of another part, thereby creating a relation between the two parts, which may be termed a quasi easement, which, however, constitutes no real interest separate and apart from his general ownership of both tracts, and his consequent right to use either as he sees fit.⁴¹

But upon the same principle adverted to as the foundation of easements by implied grant generally, namely, that where one grants land he is presumed to pass all in his power to confer that is reasonably necessary to the enjoyment of the land granted,⁴² if the owner of the two tracts should convey the quasi dominant tenement, retaining the quasi servient tract, the grant of the former carries with it by implication the right to the continued use of the servient tract, as it had been previously used. But this is subject to the qualification, at least where the servient estate subsequently or simultaneously comes into possession of some one other than the original owner, that the quasi easement is (1) apparent, (2) continuous, and (3) reasonably necessary to the enjoyment of the dominant tract.⁴³

Thus, in *Sanderlin v. Baxter*,⁴⁴ two estates, "Woodlawn" and "Fairfield," separated only by a public road, were both owned by W., who drained Woodlawn by ditches through Fairfield to the river. In 1811, W. granted Woodlawn to A. (under whom the plaintiff claimed), and in 1820 he devised Fairfield to D. (under whom the defendant claimed). The deed and will were both silent about the drainage; but at the time Woodlawn was conveyed these draining ditches were open and visible, operating regularly and continuously, and were then, as they continued to be, necessary for the convenient and beneficial use and enjoyment of Woodlawn, for which purpose they were continuously used down to 1878, when they were obstructed by Sanderlin, the then owner of Fairfield. Thereupon Baxter, the owner of Woodlawn, enjoined Sanderlin from obstructing the ditches, and the injunction was made perpetual.

On the other hand, in *Scott v. Beutel*,⁴⁵ a like relief was denied because the easement claimed was not obvious and apparent, nor known by the purchaser to exist at the time of the purchase.

In *Paine v. Chandler*⁴⁶ pipes for the supply of water were laid through one tract to another, both tracts at the time belonging to

⁴¹Ante, § 88.

⁴²Ante, § 95.

⁴³2 Min. Insts. 26; *Nicholas v. Chamberlain*, 3 Cro. (Jac.) 121; *Lampman v. Mills*, 21 N. Y. 505; *Elliott v. Rhett*, 5 Rich. (S. C.) 405, 57 Am. Dec. 753, 759, note; *Scott v. Moore*, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749; *Riverside Cotton Mills v. Lanier*, 102 Va. 148, 45 S. E. 875; *Thayer v. Payne*, 2 Cush. (Mass.) 327.

⁴⁴76 Va. 304, 44 Am. Rep. 165.

⁴⁵23 Grat. (Va.) 6, 7.

⁴⁶134 N. Y. 385, 35 N. E. 18, 19 L. R. A. 99.

the same owner, but the ownership later became separated; and it was held that the easement, being apparent, continuous and necessary, passed with the transfer of the dominant tract.

Upon the same principle, it is the doctrine in England that if one owns two adjacent vacant lots, and upon one places a building whose windows overlook the other vacant lot, and he subsequently conveys the lot with the building on it, retaining the vacant one, the grantee is entitled to an easement of light over the vacant lot, which cannot subsequently be obstructed by the erection of a building on such vacant lot.⁴⁷ But this doctrine has been repudiated quite generally in this country, on the same grounds as the doctrine of ancient lights acquired by prescription,⁴⁸ namely, that it would tend to check the upbuilding of towns, and to burden the land unduly.⁴⁹

The conditions under which the separation of the ownership occurs is immaterial. There may be successive transfers of the respective tracts, or the transfers may be simultaneous, as where the two are transferred to different persons by one devise, or one decree of partition or of foreclosure.⁵⁰

§ 98. 5. Easements Acquired by Implied Reservation. These easements, while classified in the same way as easements arising by implied grant, rest upon a different basis. The latter, as we have seen, is based upon the principle that one who grants land is presumed to intend to pass out of himself to the grantee of the land everything which is necessary for the reasonable use and enjoyment of the land granted, since otherwise he would derogate from his own grant.⁵¹

⁴⁷ *Swansborough v. Coventry*, 9 Bing. 305.

⁴⁸ For the doctrine of "ancient lights," see post, § 118.

⁴⁹ *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Doyle v. Lord*, 64 N. Y. 432, 21 Am. Rep. 629; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Ray v. Sweeney*, 14 Bush (Ky.) 1, 29 Am. Rep. 388. But a few courts follow the English rule. *Greer v. Van Meter*, 54 N. J. Eq. 270, 33 Atl. 794; *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300. Others make the decision depend upon whether the light is actually necessary to the use of the building. *Rennyson's Appeal*, 94 Pa. 147, 39 Am. Rep. 777; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629; *Turner v. Thompson*, 58 Ga. 268, 24 Am. Rep. 297; *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582.

⁵⁰ 2 Min. Insts. 27; *Burwell v. Hobson*, 12 Grat. (Va.) 322, 65 Am. Dec. 247; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Ellis v. Bassett*, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421; *Greer v. Van Meter*, 54 N. J. Eq. 270, 33 Atl. 794; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671; *Clark v. Debaugh*, 67 Md. 430, 10 Atl. 241; *Baker v. Rice*, 56 Ohio St. 463, 47 N. E. 653; *Russell v. Watts*, 25 Ch. Div. 559, 10 App. Cas. 590.

⁵¹ Ante, §§ 95, 96; 2 Min. Insts. 27.

It is obvious that an implied reservation of an easement cannot be based upon these grounds; indeed, they rest upon the very opposite presumption (arising under certain peculiar conditions), namely, that the parties have intended that the grantor should retain something, instead of passing it with the land, and also that they should have designed that he to some extent should derogate from his own grant.

The implied reservations of easements must be based upon grounds of public policy, which does not approve of the ownership of lands without the practical capacity to make them useful and beneficial to the community, and hence, in order to make the land retained by the grantor productive and useful to the public (the individual grantor's interest being only incidental), it may become necessary to imply an easement in land conveyed (the servient estate) in favor of the dominant tract retained by the grantor. But there is found more difficulty in establishing an inference of the implied reservation than of the implied grant of an easement, as will appear in the following sections.

Easements arising by implied reservation are classified, like those arising by implied grant into (1) easements by necessity, and (2) easements arising from quasi easements upon a grant of the quasi servient tenement.

§ 99. Same—A. Reserved Easements by Necessity. Thus, if we suppose the owner of land to convey the same, retaining, however, a central building or farming tract, surrounded on all sides by the land conveyed, and without stipulating for any right of way to the surrounded tract, since it would be contrary to public policy to permit such tract to remain forever useless and unproductive, it will be assumed that the parties intended that the grantor should reserve a way by necessity over the lands conveyed; and the same presumption arises, though the grantor's excepted tract is bordered on some sides by the lands of strangers.⁵²

§ 100. Same—B. Quasi Easements Converted into Reserved Easements by Transfer of Servient Tenement. The earlier doctrine in England seems to have been in favor of the implication of an easement reserved by the grantor to the same extent as in the case of one impliedly granted to the grantee, where there was a sever-

⁵² *Clark v. Cogge*, 3 Cro. (Jac.) 170; *Corporation of London v. Riggs*, 13 Ch. Div. 798; *Pinnington v. Galland*, 9 Exch. 1; *Packer v. Welsted*, 2 Sim. 39, 111; *New York, etc., R. Co. v. Railroad Com'rs*, 162 Mass. 81, 38 N. E. 27; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Whitehouse v. Cummings*, 83 Me. 91, 21 Atl. 743, 23 Am. St. Rep. 756; *Jay v. Michael*, 92 Md. 198, 48 Atl. 61; *Meredith v. Frank*, 56 Ohio St. 479, 47 N. E. 656.

ance of the ownership by the transfer of the servient tenement, the grantor retaining the quasi dominant estate.⁵³

But the later English cases seem to repudiate this rule, on the ground that a grantor cannot thus derogate from his own grant, in the absence of express stipulations, except, perhaps, where the easement is of strict and obvious necessity.⁵⁴

In the United States the same difficulty has been encountered, and the same divergence of view exists; but, since no absence of an easement of this sort is apt to make the land totally useless and unproductive, the modern tendency is in the direction of the later English cases, denying the implication of a reservation by the grantor, except, as in England, where the easement is strictly and obviously necessary.⁵⁵

But an exception must be noted to this general tendency against the creation of this sort of easement by the implied reservation of the grantor in the case of reciprocal quasi easements, which generally consist of the mutual support of two buildings by one another. Thus, where one erects buildings on two adjacent lots, which buildings mutually support each other, and he then conveys one of the buildings, retaining the other, the easement of support for his building is impliedly reserved by the grantor, in consideration of the support impliedly granted to the grantee. Each is a quasi dominant, as well as a quasi servient, tenement.⁵⁶

§ 101. 6. Easements Acquired by Prescription. Prescriptive title is based upon the presumption of a grant, arising after long-con-

⁵³ *Nicholas v. Chamberlain*, 3 Cro. (Jac.) 121; *Pyer v. Carter*, 1 Hurl. & N. 916; 2 Min. Insts. 28.

⁵⁴ 2 Min. Insts. 28; *White v. Bass*, 7 Hurl. & N. 722; *Suffield v. Brown*, 4 De Gex, J. & S. 185; *Wheeldon v. Burrows*, 12 Ch. Div. 31; *Elliott v. Rhett*, 5 Rich. (S. C.) 405, 57 Am. Dec. 753, 768, note.

⁵⁵ *Adams v. Marshall*, 138 Mass. 228, 52 Am. Rep. 271; *Wells v. Garbutt*, 132 N. Y. 430, 30 N. E. 978; *Crosland v. Rogers*, 32 S. C. 130, 10 S. E. 874; *Eliason v. Grove*, 85 Md. 215, 36 Atl. 841; *Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404; *Meredith v. Frank*, 56 Ohio St. 479, 47 N. E. 656. But see 2 Min. Insts. 27, 28; *Seibert v. Levan*, 8 Pa. 383, 49 Am. Dec. 525; *Grace M. E. Church v. Dobbins*, 153 Pa. 294, 25 Atl. 1120, 34 Am. St. Rep. 706; *Denton v. Leddell*, 23 N. J. Eq. 64; *Greer v. Van Meter*, 54 N. J. Eq. 270, 33 Atl. 794; *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550; *Dunklee v. Wilton R. Co.*, 24 N. H. 489.

⁵⁶ *Wheeldon v. Burrows*, 12 Ch. Div. 31; *Suffield v. Brown*, 4 DeGex, J. & S. 185; *Richards v. Rose*, 9 Exch. 218; *Stevenson v. Wallace*, 27 Gr. (Va.) 77; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Carlton v. Blake*, 152 Mass. 176, 25 N. E. 83, 23 Am. St. Rep. 818; *Everett v. Edwards*, 149 Mass. 588, 22 N. E. 52, 5 L. R. A. 110, 14 Am. St. Rep. 462; *Heurt v. Kruger*, 121 N. Y. 386, 24 N. E. 841, 9 L. R. A. 135, 18 Am. St. Rep. 829; *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632.

tinued, adverse, uninterrupted, notorious, exclusive enjoyment of a right in the land of another, under a claim of title.⁵⁷

The extent and mode of enjoyment of an easement by prescription depends upon the extent of the user during the prescriptive period and the customary mode of enjoyment thereof during that period.⁵⁸

§ 102. 7. Easements Acquired by Estoppel. Easements are sometimes created by estoppel; for example, if the vendor of land actually or constructively makes representations as to the existence of an easement appurtenant to the land sold to be enjoyed in land which the vendor has not sold. Thus, where a vendor describes the land sold as bounded on a street described as running through the vendor's unsold land, the vendor is, as against his vendee (though not necessarily as against the public, or third persons), estopped to deny the existence of such a street; the conveyance practically creating a private right of way over the vendor's land along the route described in favor of the grantee.⁵⁹

So, also, a right of way in favor of the grantee, or an easement of light and air, may be created by a description in a deed by reference to a plat by which adjacent land of the vendor is appropriated to use as a street or a park.⁶⁰

Nor are these results affected by the fact that the vendor does not own the alleged servient lands at the time of such representations, provided he subsequently acquires them. The estoppel takes effect, and the easement is created, as soon as this subsequent acquisition of title accrues to the vendor, upon much the same principle as where the title to after-acquired lands themselves is acquired by estoppel.⁶¹

⁵⁷ Post, §§ 843, 844.

⁵⁸ See post, § 847.

⁵⁹ *Espley v. Wilkes*, L. R. 7 Exch. 298; *Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 292, 32 Am. Dec. 261; *Cole v. Hadley*, 162 Mass. 579, 39 N. E. 279; *Cox v. James*, 45 N. Y. 557; *Ott v. Kreiter*, 110 Pa. 370, 1 Atl. 724; *Carlin v. Paul*, 11 Mo. 32, 47 Am. Dec. 139; *Dawson v. St. Paul Fire & Marine Ins. Co.*, 15 Minn. 136 (Gil. 102), 2 Am. Rep. 109; *Dorman v. Bates Mfg. Co.*, 82 Me. 438, 19 Atl. 915. See post, § 1067.

⁶⁰ 1 *Tiffany*, Real Prop. § 320; *Oney v. West Buena Vista L. Co.*, 104 Va. 580, 52 S. E. 343, 2 L. R. A. (N. S.) 832, 113 Am. St. Rep. 1066; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Child v. Chappell*, 9 N. Y. 246; *Dill v. Board of Education of City of Camden*, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276; *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639; *Maywood Co. v. Maywood*, 118 Ill. 61, 6 N. E. 866.

⁶¹ Post, § 1066; 1 *Tiffany*, Real Prop. § 320; *Jarnigan v. Mairs*, 1 *Humph.* (Tenn.) 473; *Swedish-American Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 83 Minn. 377, 86 N. W. 420.

§ 103. III. Modes of Extinguishing Easements—1. Cessation of Purposes of Easement. If the particular purpose for which the easement is granted is fulfilled, or otherwise ceases to exist, the easement also falls to the ground.⁶²

In determining questions of this sort, the terms of the grant, or, if it be implied, the circumstances from which the implication arises, are to be looked to in order to ascertain the scope and extent of the easement. Thus, if the easement consist of a right to maintain on adjoining land a staircase leading to a building on the dominant tract, and the dominant building is destroyed or torn down, it would depend upon the construction of the original grant whether the easement was intended to be appurtenant to that particular building only, or to another building substituted in its place.⁶³

It has been very generally laid down that rights of way by necessity terminate as soon as the necessity which has called them into existence ceases, as when the user thereof acquires another mode of access.⁶⁴ Since the creation of the easement is the direct result of the implied intention of the parties, and not of the mere necessity as such,⁶⁵ the conclusion above reached, if correct, must be due to the fact that the implied grant is of an easement of passage, to last only so long as the necessity therefor exists, and not of a way to endure permanently, such as would arise under a grant of a way in ordinary terms. The implication first mentioned would be more likely to arise in the case of a way reserved by necessity, since that is based less upon the implied intention of the parties than upon the bare necessity of the case and public policy.⁶⁶

⁶² *Linkenhoker v. Graybill*, 80 Va. 835; *Central Wharf & Wet Dock Corp. v. Proprietors of India Wharf*, 123 Mass. 567; *Bangs v. Potter*, 135 Mass. 245; *Weis v. Meyer*, 55 Ark. 18, 17 S. W. 339; *Day v. Walden*, 46 Mich. 575, 10 N. W. 26; *Hahn v. Baker Lodge*, No. 47, 21 Or. 30, 27 Pac. 166, 13 L. R. A. 158, 28 Am. St. Rep. 723.

⁶³ *Douglas v. Coonley*, 156 N. Y. 521, 51 N. E. 283, 66 Am. St. Rep. 580; *Shirley v. Crabb*, 138 Ind. 200, 37 N. E. 130, 46 Am. St. Rep. 376; *Hahn v. Baker Lodge*, No. 47, 21 Or. 30, 27 Pac. 166, 13 L. R. A. 158, 28 Am. St. Rep. 723. So, also, in the case of the destruction of a party wall, or of the buildings separated thereby. *Douglas v. Coonley*, supra; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Heartt v. Kruger*, 121 N. Y. 386, 24 N. E. 841, 9 L. R. A. 135, 18 Am. St. Rep. 829; *Antomarchi v. Russell*, 63 Ala. 356, 35 Am. Rep. 40; *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491; *Duncan v. Rodecker*, 90 Wis. 1, 62 N. W. 533.

⁶⁴ *Holmes v. Goring*, 2 Bing. 76; *Viall v. Carpenter*, 14 Gray (Mass.) 126; *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653; *Whitehouse v. Cummings*, 83 Me. 91, 21 Atl. 743, 23 Am. St. Rep. 756; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Oliver v. Hook*, 47 Md. 301; *Alley v. Carleton*, 29 Tex. 78, 94 Am. Dec. 260; *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839.

⁶⁵ Ante, § 96.

⁶⁶ Ante, § 99.

§ 104. **2. Easements Extinguished by Express Release.** If the owner of the dominant estate expressly release to the servient owner the outstanding right to use the latter's land for the purposes of the easement, it is obvious that this should extinguish the easement.⁶⁷

The only principle to be here noted is that, even at common law, such a release is required to be under seal, since it must rise to the same dignity as the instrument creating the easement (a grant).⁶⁸

§ 105. **3. Easements Extinguished by Abandonment (Implied Release).** Prolonged nonuser of an easement, standing alone, does not suffice to show an abandonment, even though the nonuser continues for twenty years or other prescriptive period.⁶⁹ In addition to the mere nonuser, there must be either acts on the part of the owner of the dominant tract, showing an intent to abandon permanently the use of the servient land,⁷⁰ or acts of the owner of the servient tract, showing an intent to obstruct the dominant owner's enjoyment of the easement.⁷¹

It is not necessary, however, that the nonuser, when accompanied by other acts of the dominant owner, should continue for the full period of prescription.⁷²

⁶⁷ See *Richards v. Attleborough Branch R. Co.*, 153 Mass. 120, 26 N. E. 418; *McAllister v. Devane*, 76 N. C. 57; *Flaten v. Moorehead*, 58 Minn. 324, 59 N. W. 1044.

⁶⁸ 2 Min. Insts. 20; 1 *Tiffany*, Real Prop. § 329; Co. Litt. 264b; Bac. Abr. Release (D).

⁶⁹ *Moore v. Rawson*, 3 B. & Cr. 332; *Ward v. Ward*, 7 Exch. 838; *Watts v. C. I. Johnson, etc., Corp.*, 105 Va. 519, 525, 54 S. E. 317; *Norfolk & W. R. Co. v. Obenchain*, 107 Va. 596, 59 S. E. 604; *King v. Murphy*, 140 Mass. 254, 4 N. E. 566; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128; *Canny v. Andrews*, 123 Mass. 155; *Bannon v. Angier*, 2 Allen (Mass.) 128; *Dana v. Valentine*, 5 Mete. (Mass.) 8; *Welsh v. Taylor*, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535; *Bombaugh v. Miller*, 82 Pa. 203; *Lindeman v. Lindsey*, 69 Pa. 93, 8 Am. Rep. 219; *Willey v. Norfolk Southern R. Co.*, 96 N. C. 408, 1 S. E. 446; *Polson v. Ingram*, 22 S. C. 541; *Ford v. Harris*, 95 Ga. 97, 22 S. E. 144; *Dill v. School Board*, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276; *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342; *Day v. Walden*, 46 Mich. 575, 10 N. W. 26; *Pratt v. Sweetser*, 68 Me. 344; *Wheeler v. Wilder*, 61 N. H. 2; *Steere v. Tiffany*, 13 R. I. 568.

⁷⁰ *Moore v. Rawson*, 3 B. & Cr. 332; *Watts v. C. I. Johnson & Bowman Real Estate Corp.*, 105 Va. 525, 54 S. E. 317; *King v. Murphy*, 140 Mass. 254, 4 N. E. 566; *Canny v. Andrews*, 123 Mass. 155; *Spell v. Levitt*, 110 N. Y. 595, 18 N. E. 370, 1 L. R. A. 414; *Stein v. Dahm*, 96 Ala. 481, 11 South. 597; *Louisville & N. R. Co. v. Covington*, 2 Bush (Ky.) 526; *Monaghan v. Memphis Fair & Exposition Co.*, 95 Tenn. 108, 31 S. W. 497; *Willey v. Norfolk Southern R. Co.*, 96 N. C. 408, 1 S. E. 446; *Fitzpatrick v. Boston & M. R. Co.*, 84 Me. 33, 24 Atl. 432; *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342.

⁷¹ See post, § 108; *Norfolk & W. R. Co. v. Obenchain*, 107 Va. 601, 59 S. E. 604.

⁷² *Moore v. Rawson*, 3 B. & Cr. 332; *Reg. v. Chorley*, 12 Q. B. 515; *Scott*

§ 106. 4. Easements Extinguished by Change of Condition of Dominant Tract. The effect upon an easement of a change or alteration in the character of the dominant tract, involving an increased use of the servient land, depends, in the case of an easement by express grant or reservation, upon the construction of the language used; the general rule being that the easement is intended to continue, whatever changes or alterations may occur in the dominant tenement.⁷³ But if the intention is shown to confine the enjoyment of the easement to the needs of the dominant tenement as they exist at the time of the grant, and a subsequent change occurs in such tenement that necessarily and unavoidably calls for an increased use of the servient tract, so that the easement cannot continue to be used as first intended, the change extinguishes the easement.⁷⁴ Thus it has been held that if the owner of a private house, to which a right of drainage through the lands of another is appurtenant, changes his house into a sanitarium, the easement of drainage is extinguished.⁷⁵ So, also, upon the conveyance of the dominant tenement amongst several persons, whether each of the grantees is entitled to use the easement as before is a question of the construction of the original grant or reservation.⁷⁶

On the other hand, if the easement arises by prescription, a change in the dominant estate calling for a burden upon the servient land exceeding that devolving upon it by its customary use during the prescriptive period, if the increased use is inseparable from the former use, will operate an extinguishment of the easement.⁷⁷

v. Moore, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749; *Canny v. Andrews*, 123 Mass. 155; *Fitzpatrick v. Boston & M. R. Co.*, 84 Me. 33, 24 Atl. 432; *Steere v. Tiffany*, 13 R. I. 568; *Louisville & N. R. Co. v. Covington*, 2 Bush (Ky.) 526. But, see, *Warren v. Syme*, 7 W. Va. 474; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Cox v. Forrest*, 60 Md. 74; *Wilder v. City of St. Paul*, 12 Minn. 192 (Gil. 116); *Norfolk & W. R. Co. v. Obenchain*, 107 Va. 601, 59 S. E. 604.

⁷³ *Newcomen v. Coulson*, 5 Ch. Div. 133; *United Land Co. v. Great Eastern R. Co.*, 10 Ch. App. 586; *Bangs v. Parker*, 71 Me. 458; *Gunson v. Healy*, 100 Pa. 42; *Forbes v. Com.*, 172 Mass. 289, 52 N. E. 511; ante, § 103.

⁷⁴ *Harvey v. Walkers*, L. R. 8 C. P. 162; *Allan v. Gomme*, 11 Ad. & E. 759; *Dawson v. St. Paul Fire & Marine Ins. Co.*, 15 Minn. 136 (Gil. 102), 2 Am. Rep. 109; *Brossart v. Corlett*, 27 Iowa, 288.

⁷⁵ *Wood v. Saunders*, 10 Ch. App. 582.

⁷⁶ *Gunson v. Healy*, 100 Pa. 42; *Watson v. Bioren*, 1 Serg. & R. (Penn.) 227, 7 Am. Dec. 617; *Forbes v. Com.*, 172 Mass. 289, 52 N. E. 511; *Whitney v. Lee*, 1 Allen (Mass.) 198, 79 Am. Dec. 727; *Dawson v. St. Paul Fire & Marine Ins. Co.*, 15 Minn. 136 (Gil. 102), 2 Am. Rep. 109; *Brossart v. Corlett*, 27 Iowa, 288.

⁷⁷ *Williams v. James*, L. R. 2 C. P. 577; *Wimbledon, etc., Conservators v. Dixon*, 1 Ch. Div. 362.

In the case of easements arising by implied grant or reservation, the measure of the extent of the user is the needs of the dominant tenement at the time the implied grant or reservation arises,⁷⁸ and any subsequent change in the dominant tract which involves unavoidably an increase of burden upon the servient tract will accordingly extinguish the easement.

§ 107. 5. Easements Extinguished by Union of Dominant and Servient Tracts. Since one cannot have an easement in his own land, the general ownership of the servient tract merging the mere right to use the same for a particular purpose, it follows that, when the dominant and servient estates become vested in the same person in fee simple, the easement is completely extinguished and merged, becoming a mere ordinary incident of the general ownership of the servient tract.⁷⁹

But, in order that such complete extinguishment take place, it is necessary that the same person own both tracts in fee simple and by the same sort of title. If he has only a life estate or a term for years in one or both tracts, though for the time being the owner of both, this does not extinguish the easement, but merely suspends it until the termination of his interest in one of the tracts or in both, after which it is ipso facto revived.⁸⁰

So, also, the fact that the owner holds the legal and equitable title to one tract, while holding merely the bare legal title or the bare equitable title to the other, prevents an extinguishment of the easement;⁸¹ and so would the fact that the user's interest in one of the tracts is undivided, as where he is a joint tenant or tenant in common thereof.⁸²

§ 108. 6. Easements Extinguished by Adverse Acts of Servient Owner. An easement, once created, is not extinguished by the mere acts of the servient owner in themselves, however adverse they may be to the enjoyment of the easement by the dominant proprietor, and however clearly they may indicate the desire and in-

⁷⁸ Ante, § 96.

⁷⁹ 2 Min. Insts. 20; *Bright v. Walker*, 1 Crompt. M. & R. 211, 219; *Atwater v. Bodfish*, 11 Gray (Mass.) 150; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Plimpton v. Converse*, 42 Vt. 712; *Capron v. Greenway*, 74 Md. 289, 22 Atl. 269; *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. 509.

⁸⁰ 2 Min. Insts. 20; *Thomas v. Thomas*, 2 Crompt. M. & R. 34; *James v. Plant*, 4 Ad. & E. 749; *Pearce v. McClenaghan*, 5 Rich. Law (S. C.) 178, 55 Am. Dec. 710. See *Petition of Bull*, 15 R. I. 534, 10 Atl. 484.

⁸¹ *Ritger v. Parker*, 8 Cush. (Mass.) 145, 54 Am. Dec. 744; *Pearce v. McClenaghan*, 5 Rich. Law (S. C.) 178, 55 Am. Dec. 710; *Ecclesiastical Com'rs v. Kino*, 14 Ch. Div. 213.

⁸² *Atlanta Mills v. Mason*, 120 Mass. 244; *Dority v. Dunning*, 78 Me. 381, 6 Atl. 6.

tention of the servient owner to put a stop to the use of his land. There must be added to those acts other circumstances showing an intention on the part of the dominant owner to abandon or release the easement.

Thus, if adverse acts of the servient owner are coupled with the nonuser of the easement by the dominant owner this will generally be evidence, as we have seen, of an abandonment of the easement, even though such adverse acts and nonuser have not lasted during the prescriptive period.⁸³

So, also, if the servient owner should by adverse acts lasting through the prescriptive period obstruct the dominant owner's enjoyment, intending to deprive him of the easement, he may by prescription acquire the right to use his own land free from the easement, and thus extinguish it, provided his adverse acts constitute a legal interference with the other's right and would give rise to a right of action by him.⁸⁴

Lastly, the servient owner may extinguish an easement by performing acts thereon permanently obstructive of the easement under the license or authority of the owner of the easement; for in such case the license is irrevocable, if it authorizes the erection of buildings on the servient estate or other acts involving expenditure, and such expenditure has been made in whole or in part.⁸⁵ Thus, in *Winter v. Brockwell*,⁸⁶ one entitled to an easement of light over another's land gave a license to the servient owner to erect a building on the servient land which obstructed the light, and it was held that the license was irrevocable, and the easement extinguished.

⁸³ Ante, § 105.

⁸⁴ *Watts v. C. I. Johnson & Bowman Real Estate Corp.*, 105 Va. 525, 54 S. E. 317; *Norfolk & W. R. Co. v. Obenchain*, 107 Va. 601, 59 S. E. 604; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128; *Smith v. Langewald*, 140 Mass. 205, 4 N. E. 571; *Woodruff v. Paddock*, 130 N. Y. 618, 29 N. E. 1021; *Lindeman v. Lindsey*, 69 Pa. 93, 8 Am. Rep. 219; *Spackman v. Steidel*, 88 Pa. 453; *State v. Suttle*, 115 N. C. 784, 20 S. E. 725; *Bowen v. Team*, 6 Rich. Law (S. C.) 298, 60 Am. Dec. 127; *Louisville & N. R. Co. v. Quinn*, 94 Ky. 310, 22 S. W. 221; *Dill v. School Board*, 47 N. J. Eq. 421, 20 Atl. 730, 10 L. R. A. 276; *Bentley v. Root*, 19 R. I. 205, 32 Atl. 918; *City of Galveston v. Williams*, 69 Tex. 449, 6 S. W. 860; *Day v. Walden*, 46 Mich. 575, 10 N. W. 26.

⁸⁵ *Hawkins v. Shippam*, 5 B. & Cr. 221, explaining *Winter v. Brockwell*, 8 East, 308; *Liggins v. Inge*, 7 Bing. 682; *Boston & P. R. Corp. v. Doherty*, 154 Mass. 314, 28 N. E. 277; *Morse v. Copeland*, 2 Gray (Mass.) 302; *Cartwright v. Maplesden*, 53 N. Y. 622; *White v. Manhattan Ry. Co.*, 139 N. Y. 19, 34 N. E. 887; *Stein v. Dahm*, 96 Ala. 481, 11 South. 597; *Vogler v. Geiss*, 51 Md. 407; *Addison v. Hack*, 2 Gill (Md.) 221, 41 Am. Dec. 421. But see *Peck v. Loyd*, 38 Conn. 566. See post, § 127.

⁸⁶ 8 East, 308. See *Hawkins v. Shippam*, 5 B. & Cr. 221.

§ 109. 7. Easements Extinguished by Transfer of Servient Tract to a Purchaser without Notice. Certain easements are of such a nature that the use and enjoyment of them is obvious and apparent, for example, the right of drip, surface drains, etc.; while the use and enjoyment of others are or may be hidden and invisible to the physical eye, such as underground drainage, or may be entirely consistent with the absence of all right to such use, as in the case of the easement of light, air, or prospect over a vacant lot.

The last two classes of easements may readily escape the notice of a purchaser of the servient lot, and it would be an injustice to him to require him to admit such a burden, when he buys without notice thereof. Hence it is a well-established principle governing the purchase of servient tenements that an easement therein is extinguished unless the purchaser has either actual notice of the existence of the easement, or constructive notice from the recordation of the express grant or reservation creating it, or from the fact that its use and enjoyment is open and visible.⁸⁷

§ 110. IV. Particular Instances of Easements, Their Use and Enjoyment—1. Ways. These are divided into public and private; but it is only the latter class that constitutes private property in real estate, and to it our attention will be confined.

The private way is perhaps the most frequently occurring and the most typical of all easements, and the principles regulating the use and enjoyment of ways in the main regulate the other easements also.

The principles applicable to ways have already been so fully considered that it is scarcely necessary to examine the subject further, except in regard to the various classes of ways and the repair of the way.

§ 111. Same—The Several Classes of Ways. Ways include both highways and private ways; but, as has been already said, the latter meaning is the one usually intended, and it is in that sense alone that it belongs to the subject of easements.

A highway, or public road, is a way common to all persons, and at common law may be a foot way, horse way, drift or drive way, etc.⁸⁸ If it is not common to all persons, but only to the residents of a particular locality, it is at common law distinguished as a common way.⁸⁹

⁸⁷ Scott v. Moore, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749; Taylor v. Millard, 116 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667; Corning v. Gould, 16 Wend. (N. Y.) 531; Rome Gaslight Co. v. Meyerhardt, 61 Ga. 287; Wissler v. Hershey, 23 Pa. 333; Ellis v. Bassett, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421; Taggart v. Warner, 83 Wis. 1, 53 N. W. 33. See ante, §§ 97, 100.

⁸⁸ 2 Min. Insts. 17.

⁸⁹ 2 Min. Insts. 17. Until a period comparatively recent, the legal idea

The several classes of private ways are a foot way, a horse or drift way (for a horse or the driving of cattle) and a cart way (for any manner of wheel vehicle). A cart way includes in general all the rest, and a horse or drift way includes a foot way; but one who has only a foot way cannot ride or drive cattle over it, nor can one entitled only to a drift way pass over it with a vehicle.⁹⁰

§ 112. **Same—Repair of the Way.** When there is no stipulation to the contrary, it is the duty of the grantee of the way to repair it, and he always has a right to enter upon the servient land for that purpose.⁹¹ The grantor (the servient owner) is only bound to repair when it is so agreed.⁹²

When it is the duty of the servient owner to repair, and he fails to do it, the owner of the easement may go upon the adjacent lands of the servient owner whenever the way becomes foundrous and impassable; but he has no such privilege if it is his own duty to repair.⁹³

§ 113. **2. Support of Land.** Every owner of land is entitled, as a matter of natural right, to the support of his land by (1) adjacent land, and (2) subjacent land, and therefore is entitled to recover damages from the servient owner for excavating or improving the servient land, if it causes a sinking or disturbance of his own. This right he is as much entitled to as to the land itself, without any grant by the servient owner or any act of acquisition on his own part.⁹⁴

of a highway was that it should lead from town to town, and therefore the ancient form of indictment for obstructing it showed the termini. The modern idea, however, is, as above stated, that it is common to all people alike. 2 Min. Insts. 17, 18.

⁹⁰ 2 Min. Insts. 19; 1 Th. Co. Lit. 233, 234, note (B, 1); Ballard v. Dyson, 1 Taunt. 279; Welch v. Wilcox, 101 Mass. 162, 100 Am. Dec. 113, note.

⁹¹ 2 Min. Insts. 20; Pomfret v. Ricroft, 1 Saund. 322a, note (3), 323, note (6); Brown v. Stone, 10 Gray (Mass.) 61, 69 Am. Dec. 303; Prescott v. White, 21 Pick. (Mass.) 341, 32 Am. Dec. 266; McMillan v. Cronin, 75 N. Y. 474; Hammond v. Woodman, 41 Me. 177, 66 Am. Dec. 219; Walker v. Pierce, 38 Vt. 94; Pico v. Colimas, 32 Cal. 578.

⁹² 2 Min. Insts. 20; Norfolk & W. R. Co. v. De Board, 91 Va. 700, 22 S. E. 514, 29 L. R. A. 825; Walker v. Pierce, 38 Vt. 94; Doane v. Badger, 12 Mass. 65; Wynkoop v. Burger, 12 Johns. (N. Y.) 222; Ballard v. Butler, 30 Me. 94; Gillis v. Nelson, 16 La. Ann. 275.

⁹³ 2 Min. Insts. 20. In the case of a highway, which is for the service of the public, if the usual track is impassable, it is for the general good that people should be entitled to pass in another line; and the person whose land is thus invaded must seek his redress, it is presumed, against the overseer, or other public officer, whose duty it is to keep the road in repair. 2 Min. Insts. 20; 2 Bl. Com. 36; Taylor v. Whitehead, 2 Dougl. 749.

⁹⁴ 2 Min. Insts. 24; Humphries v. Brogden, 12 Q. B. 739; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336; Tunstall v. Christian, 80 Va. 1,

The burden of this support extends to so much of the adjacent land, whether owned entirely by one person or not, as is naturally required to afford the proper support,⁹⁵ but does not extend to land which, in the natural state of things, is so far distant that no excavations upon it will affect the other land, though the intervening land has been so excavated that the supported land has come to rely (though not by nature) for support upon the more distant land.⁹⁶

But the right is merely the right of support, not the right to demand that the supporting land shall remain in its natural condition (for that would put an end to all excavations and improvements), and hence, if the servient owner substitutes artificial support, it will suffice if efficient. It follows, also, that there is no right of action until the plaintiff's land actually sinks.⁹⁷

According to the prevailing doctrine in the United States, the rule has no application where the excavation is made by the municipal authorities in the course of grading a street.⁹⁸ But this doctrine is not recognized in every state, and it would seem that the minority view is sustained by the better reason.⁹⁹

A similar natural right of support exists, as against subjacent land, in cases where the ownership of the surface of the land and of the minerals and soil under the surface is in separate persons; the principles being the same as govern lateral support or the support by adjacent land.¹

56 Am. Rep. 581; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465, 60 Am. Dec. 283; *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642.

⁹⁵ *Birmingham v. Allen*, 6 Ch. Div. 284; *Keating v. City of Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421.

⁹⁶ *Birmingham v. Allen*, 6 Ch. Div. 284. But see *Foley v. Wyeth*, 2 Allen (Mass.) 131, 79 Am. Dec. 771.

⁹⁷ *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Bonomi v. Backhouse*, El., Bl. & El., 654; *Darley Colliery Co. v. Mitchell*, 11 App. Cas. 127; *Schultz v. Bower*, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630; *Smith v. City of Seattle*, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. Rep. 910. But see *Noonan v. Pardee*, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722. See 15 Harv. Law Rev. 574.

⁹⁸ 2 Dillon, Mun. Corp. §§ 989, 990; *Radcliff v. Mayor, etc., of Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Fellowes v. City of New Haven*, 44 Conn. 240, 26 Am. Rep. 447; *Mayor, etc., of City of Rome v. Omberg*, 28 Ga. 46, 73 Am. Dec. 748; *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243. See 1 Va. Law Rev. 619.

⁹⁹ *Stearns v. Richmond*, 88 Va. 992, 14 S. E. 847, 29 Am. St. Rep. 758; *Dyer v. City of St. Paul*, 27 Minn. 457, 8 N. W. 272; *Parke v. City of Seattle*, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68, 34 Am. St. Rep. 839; *Keating v. City of Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421; *City of Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 73.

¹ *Humphries v. Brogden*, 12 Q. B. 739; *Marvin v. Brewster Iron Min. Co.*,

The right of support, wherever it exists, whether by natural right or by agreement, supposes an absolute obligation upon the servient owner, regardless of any negligence on his part in making the excavations or improvements. If he is guilty of negligence, and excavates without due care and warning, and buildings fall or are weakened as the result, he is liable, even in the absence of any easement of support.²

§ 114. 3. **Support of Buildings.** The natural right of support, either lateral or subjacent, applies in general only to land in its natural state. If such a right is claimed for the added weight of buildings, or for the support of buildings by buildings an express grant or reservation of an easement to that effect must be shown.³

But an exception is to be noted to this general principle, in the case where, as a result of the excavation, the land would have fallen any way, even without the added weight of the building. In such case, according to the better view, the owner may recover damages for the building as well as for the land.⁴

§ 115. 4. **Party Walls and Division Fences.** Party walls and division fences have much the same general meaning; the first be-

55 N. Y. 538, 556, 14 Am. Rep. 322; *Carlin v. Chappel*, 101 Pa. 348, 47 Am. Rep. 722; *Burgner v. Humphrey*, 41 Ohio St. 340; *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242. This applies, also, as between the upper and lower floors of a building. See *Graves v. Berdan*, 26 N. Y. 501; *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265; *Rhodes v. McCormick*, 4 Iowa, 375, 68 Am. Dec. 663; *Harris v. Ryding*, 5 M. & W. 60.

² 2 Min. Insts. 24; *Dodd v. Holmes*, 1 Ad. & El. 493; *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642, 648, note.

³ 2 Min. Insts. 24; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220; *Dalton v. Angus*, 6 App. Cas. 740; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Pierce v. Dyer*, 109 Mass. 374, 12 Am. Rep. 716; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Dorrity v. Rapp*, 72 N. Y. 307; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 14 Am. Rep. 322; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242; *Panton v. Holland*, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770; *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642; *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243.

⁴ *Brown v. Robins*, 4 Hurl. & N. 186; *Hamer v. Knowles*, 6 Hurl. & N. 474; *Stearns v. City of Richmond*, 88 Va. 992, 14 S. E. 847, 29 Am. St. Rep. 758; *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242; *Parke v. City of Seattle*, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68, 34 Am. St. Rep. 839; *Beard v. Murphy*, 37 Vt. 99, 86 Am. Dec. 693. But see *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Panton v. Holland*, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; *Schultz v. Byers*, 53 N. J. Law. 442, 22 Atl. 514, 13 L. R. A. 569, 26 Am. St. Rep. 435; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Gildersleeve v. Hammond*, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46; *McGettigan v. Potts*, 149 Pa. 155, 24 Atl. 198; *Obert v. Dunn*, 140 Mo. 476, 41 S. W. 901.

ing applied to the case of a dividing wall between two buildings belonging to different owners, each having an interest in the wall, and the latter to a fence or hedge between two tracts of land, the owner of each tract having an interest in the fence or hedge.⁵ But the nature of the interests held by the adjoining owners in these two subjects are somewhat different, and therefore they had best be treated separately.

§ 116. **Same—A. Party Walls.** An easement in a party wall may exist in two forms: (1) The wall may be the property of one of the owners, being erected entirely upon his land, but by grant or prescription subject to an easement of support for beams, rafters, etc., on the part of the owner of the adjacent house, and a right by him to have it maintained as a party wall.⁶ (2) The wall may be built partly on the land of each of the adjoining owners, each therefore owning his half of the wall, but with reciprocal or mutual easements of support, etc. The latter is much the more usual form.⁷

Apart from statute or agreement, the owner of one tract has no right to build a wall partly on another's land, and, if he does so, he cannot compel the adjoining proprietor to contribute to the expense of its erection or its maintenance;⁸ and, furthermore, such

⁵ As to party walls, see *Watson v. Gray*, 14 Ch. Div. 192; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Tate v. Fratt*, 112 Cal. 613, 44 Pac. 1061; *Graves v. Smith*, 87 Ala. 450, 6 South. 308, 5 L. R. A. 298, 13 Am. St. Rep. 60; *Sanders v. Martin*, 2 Lea (Tenn.) 213, 31 Am. Rep. 598; *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491. As to division fences, see *Star v. Rookesby*, 1 Salk. 335; *Lawrence v. Jenkins*, L. R. 8 Q. B. 271; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Id.*, 118 Mass. 156; *Rust v. Low*, 6 Mass. 90; *Castner v. Riegel*, 54 N. J. Law, 498, 24 Atl. 484; *Adams v. Van Alstyne*, 25 N. Y. 232.

⁶ *Rogers v. Sinsheimer*, 50 N. Y. 646; *Tate v. Fratt*, 112 Cal. 613, 44 Pac. 1061; *Barry v. Edlavitch*, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294.

⁷ *Schwalm v. Beardsley*, 106 Va. 409, 56 S. E. 135; *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Hendricks v. Stark*, 37 N. Y. 106, 93 Am. Dec. 549; *Graves v. Smith*, 87 Ala. 450, 6 South. 308, 5 L. R. A. 298, 13 Am. St. Rep. 60; *Sanders v. Martin*, 2 Lea (Tenn.) 213, 31 Am. Rep. 598; *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491; *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287; *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627; *Ingals v. Plamondon*, 75 Ill. 118; *Andrae v. Haseltine*, 58 Wis. 395, 17 N. W. 18, 46 Am. Rep. 635. If these easements do not exist, the wall is mere property, owned either entirely by one of the parties or in common by both, and is subject to the ordinary rules governing property of that description. *Watson v. Gray*, 14 Ch. Div. 192; *Cubitt v. Porter*, 8 B. & Cr. 257; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; *Matts v. Hawkins*, 5 Taunt. 20; *Murly v. McDermott*, 8 Ad. & E. 138; *Montgomery v. Trustees of Masonic Hall in City of Augusta*, 70 Ga. 38; *Sherred v. Cisco*, 4 Sandf. Ch. (N. Y.) 480.

⁸ 2 Min. Insts. 28; 3 Kent, Com. 437 et seq.

adjoining proprietor may use the wall, though not contributing to its erection or maintenance, since it has become part of his land by its erection thereon without his consent.⁹

Statutory provisions touching party walls exist in some states, usually in the form of an authority to the owner of land to place a wall partly on adjoining land, the owner of the latter to have the right to use the same upon proper contribution to the expense.¹⁰

§ 117. **Same—B. Division Fences.** At common law, in the case of division fences, as of party walls, there is no obligation upon one landowner to assist in the erection or maintenance thereof, in the absence of agreement, express or implied.¹¹

But quite generally in this country statutes have been enacted enabling adjoining proprietors, without an agreement to that effect, to compel contributions to the erection and maintenance of division fences.¹²

Independently of statute, there exists no obligation upon the owner of land to fence it in, in order to keep out trespassing persons or cattle; there being at common law an absolute obligation upon other persons to remain on their own lands or the highways and public places, and to keep their cattle there, by means of fences or otherwise. In other words, in the case of cattle and domestic animals, the common law placed the duty upon the owner of the animals to keep them upon his own land by fences or other means, and imposed no duty upon the owner of other land to keep them out.¹³

⁹ Ante, § 21; *Sherred v. Cisco*, 4 Sandf. Ch. (N. Y.) 480; *Allen v. Evans*, 161 Mass. 485, 37 N. E. 571; *Wilkins v. Jewett*, 139 Mass. 29, 29 N. E. 214; *Antomarchi v. Russell*, 63 Ala. 356, 35 Am. Rep. 40; *Bisquay v. Jeunelot*, 10 Ala. 245, 44 Am. Dec. 483; *List v. Hornbrook*, 2 W. Va. 340; *Orman v. Day*, 5 Fla. 385; *Grimley v. Davidson*, 133 Ill. 116, 24 N. E. 439. But an agreement to contribute to the expense of the wall is sometimes presumed from the acquiescence of the adjoining owner in its construction, knowing that the builder expects to be repaid. See *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347; *Huck v. Flentye*, 80 Ill. 253; *Zeininger v. Schnitzler*, 48 Kan. 63, 28 Pac. 1007.

¹⁰ See 2 Min. Insts. 28; *Jones, Easements*, § 633 et seq.; *Vollmer's Appeal*, 61 Pa. 118; *Swift v. Calnan*, 102 Iowa, 206, 71 N. W. 233, 37 L. R. A. 462, 63 Am. St. Rep. 443. Such legislation has been held to be constitutional. *Swift v. Calnan*, supra. But see *Wilkins v. Jewett*, 139 Mass. 29, 29 N. E. 214; *Traute v. White*, 46 N. J. Eq. 437, 19 Atl. 196.

¹¹ 2 Min. Insts. 28; 3 Kent, Com. 437 et seq.; *Rust v. Low*, 6 Mass. 95; *Newell v. Hill*, 2 Metc. (Mass.) 182; *Walker v. Watrous*, 8 Ala. 493, 42 Am. Dec. 646.

¹² 2 Min. Insts. 28.

¹³ 2 Bl. Com. 211; *Boyle v. Tamlyn*, 6 B. & Cr. 329, 337; *Poindexter v. May*, 98 Va. 148, 34 S. E. 971, 47 L. R. A. 588, 6 Va. Law Reg. 388, note; *Baylor v. Baltimore & O. R. Co.*, 9 W. Va. 270; *Thayer v. Arnold*, 4 Metc.

It is to be noted, also, that in the absence of statute the common-law rule as to the necessity for fences applies to railroad tracks, as well as to the lands of individuals; that is, that the railroad company is not bound to fence out trespassing cattle, and is not liable for injuries to such cattle unless guilty of such negligence as would make it liable to any trespasser.¹⁴

§ 118. 5. **Light, Air and Prospect.** While one has no natural right to either light, air or prospect, and cannot object because he has been cut off from either by the erection of buildings upon adjacent vacant land,¹⁵ even though this be done maliciously and for the sole purpose of injuring or annoying him,¹⁶ yet with respect to such air as he does get he is by natural right entitled to have it reasonably pure, and free from pollution by the use made of the adjacent land, as by the smoke, odors, dust or vapors of railroad trains, factories, etc.,¹⁷ unless he has surrendered or released such right by grant or by abandonment.¹⁸

(Mass.) 589; *Rust v. Low*, 6 Mass. 90; *Holladay v. Marsh*, 3 Wend. (N. Y.) 143, 20 Am. Dec. 678; *Vandegrift v. Rediker*, 22 N. J. Law, 185, 51 Am. Dec. 262; *Noyes v. Colby*, 30 N. H. 143; *Bonner v. De Loach*, 78 Ga. 50, 2 S. E. 546; *Webber v. Closson*, 35 Me. 26. The only exception to this rule is in the case of cattle properly driven or being on a highway or in some other public place where they may legitimately be. *Dovaston v. Payne*, 2 H. Bl. 527; *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377; *Avery v. Maxwell*, 4 N. H. 36; *Lord v. Wormwood*, 29 Me. 282, 1 Am. Rep. 586.

¹⁴ *Fawcett v. York & N. M. R. Co.*, 16 Q. B. 610; *Eames v. Salem & L. R. Co.*, 98 Mass. 560, 96 Am. Dec. 676; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349, 53 Am. Dec. 384; *Vandegrift v. Rediker*, 22 N. J. Law, 185, 51 Am. Dec. 262; *Louisville & F. R. Co. v. Ballard*, 2 Metc. (Ky.) 177; *Stucke v. Milwaukee & M. R. Co.*, 9 Wis. 202.

¹⁵ *Aldred's Case*, 9 Co. 59; *Attorney General v. Doughty*, 2 Ves. Sr. 453; *Russell v. Watts*, 10 App. Cas. 590, 596, 610; *Butt v. Imperial Gas Co.*, 2 Ch. App. 158; *Tapling v. Jones*, 11 H. L. Cas. 290; *Jenks v. Williams*, 115 Mass. 217; *Mahan v. Brown*, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; *Gallagher v. Dodge*, 48 Conn. 387, 40 Am. Rep. 182; *Pierre v. Fernald*, 26 Me. 436, 46 Am. Dec. 573; *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111, 37 Pac. 192; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Tompkins v. Harwood*, 24 N. J. Law, 425; *Ray v. Lynes*, 10 Ala. 63; *Quintini v. City of Bay St. Louis*, 64 Miss. 483, 1 South. 625, 60 Am. Rep. 62.

¹⁶ *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Mahan v. Brown*, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; *Jenkins v. Fowler*, 24 Pa. 308; *Gallagher v. Dodge*, 48 Conn. 387, 40 Am. Rep. 182; *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177. But see *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183, 21 Am. St. Rep. 510; *Peek v. Roe*, 110 Mich. 52, 67 N. W. 1080; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569.

¹⁷ *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Rapier v. Tramways Co.*, [1893] 2 Ch. 588; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec.

¹⁸ *Sturges v. Bridgman*, 11 Ch. Div. 852; *Dana v. Valentine*, 5 Metc. (Mass.) 8.

But an owner of land may acquire the easements of air or light by express grant, or its equivalent.¹⁹

With respect, however, to the acquisition of these rights by prescription, the general tendency in the United States is against this mode of acquiring the right to light or air over vacant lots on the ground that it would contravene public policy, lead to overburdening the land, and interfere with the upbuilding of the country;²⁰ but in England such acquisition by prescription is recognized as creating an easement, this being known, when applied to light, as the doctrine of "ancient lights."²¹

The same distinction between the American and English views exists in the case of the easements of light and air acquired by implied grant or reservation upon the severance of quasi dominant and quasi servient tenements.²²

While there is some question as to whether there can exist such an easement as that of mere prospect or view, because of the indefiniteness and uncertainty of what constitutes a good prospect, and because it is matter of delight only (as the older books express it) and not of necessity,²³ it is probable that, where the right to the continued enjoyment of a fine prospect has been expressly granted over a vacant lot, the erection of a building thereon or other obstruction thereto would be actionable.

§ 119. 6. **Drainage of Surface Water.** We have considered elsewhere the rules applicable to rights in water flowing in natural channels or water courses, which are not strictly easements, but rights to a corporeal substance.²⁴

But the right of one proprietor to have the surface water (col-

654; *Rhodes v. Dunbar*, 57 Pa. 274, 98 Am. Dec. 221; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51; *Pennoyer v. Allen*, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728; *Francis v. Schoellkopf*, 53 N. Y. 152.

¹⁹ *Chastey v. Ackland*, [1895] 2 Ch. 389, [1897] App. Cas. 155; *Brooks v. Reynolds*, 106 Mass. 31; *Story v. Odin*, 12 Mass. 157, 7 Am. Dec. 46; *Lattimer v. Livermore*, 72 N. Y. 174; *Weigmann v. Jones*, 163 Pa. 330, 30 Atl. 198; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; *Turner v. Thompson*, 58 Ga. 268, 24 Am. Rep. 297.

²⁰ 3 Min. Insts. 24, 25; *Tunstall v. Christian*, 80 Va. 4, 56 Am. Rep. 581; *Morrison v. Marquardt*, 24 Iowa, 35, 92 Am. Dec. 451; *Story v. Odin*, 12 Mass. 157, 7 Am. Dec. 50, note; *Parker v. Foote*, 19 Wend. (N. Y.) 309.

²¹ 3 Min. Insts. 21; *Aldred's Case*, 9 Co. 58, note (B); *Palmer v. Fletcher*, 1 Lev. 122; *Rosewell v. Pryor*, 1 Ld. Raym. 713, 2 Salk. 459; *Campbell v. Wilson*, 3 East, 294; *Daniel v. North*, 11 East, 372; *Wood v. Veal*, 5 B. & Ald. 454.

²² Ante, § 97.

²³ 3 Min. Insts. 23; *Aldred's Case*, 4 Co. 58b.

²⁴ Ante, § 50 et seq.

lecting from rain, snow and the like, and not flowing in defined channels) drain from his land upon the lower land of an adjacent proprietor, or the right of the lower proprietor to obstruct such drainage and thus throw such water back upon the lands of the first owner, are instances of true easements, and are appropriately to be discussed here.

The surface water, collected from rains or snow in small pools, or rising in variable quantities out of marshy and boggy ground, having no defined course and flowing in no natural channel, the supply being merely casual and occasional, can generally be of little use to him upon whose land it collects, and the question usually is not how far he may use it to the detriment of a lower proprietor, but how far he may get rid of it, though to the injury of a lower proprietor.

It is to be noted in the first place that since the supply is not constant, nor wont to flow in a defined channel, a lower proprietor is not entitled *ex jure naturæ* to the water, as in the case of water flowing in a natural water course, and he has no right to complain if it is cut off altogether before reaching some defined natural channel, though it might have found its way, if undiverted and not meanwhile evaporated or absorbed, into some brook, and so have contributed to work his mill, or otherwise to benefit him.²⁵

But litigation as to surface water usually arises with respect to the right of one proprietor to rid himself thereof by permitting it in natural course, or by inducing it by artificial means, to flow upon neighboring land; or, conversely, with respect to the neighbor's right to obstruct its flow and throw it back upon the land of the first proprietor.

There are three cases that may arise here.

(1) If the flow, such as it is, flows in a natural and defined channel along which the water has been wont to drain from the land above, the authorities seem agreed that the lower proprietor has no right to obstruct the flow, in the absence of grant or prescription.²⁶

(2) If the flow is aided by ditches or other artificial means, so as to discharge the surface water in volume upon the lower lands, it seems equally well settled that the upper proprietor has exceed-

²⁵ *Chasemore v. Richards*, 7 H. L. Cas. 349; *Rawston v. Taylor*, 11 Exch. 382; *Broadbent v. Ramsbotham*, 11 Exch. 614, 615; *Jack v. Martin*, 12 Wend. (N. Y.) 329; *Parks v. City of Newburyport*, 10 Gray (Mass.) 28; *Curtiss v. Ayrault*, 47 N. Y. 73; *Case v. Hoffman*, 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, 44 L. R. A. 728; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721.

²⁶ *Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Hoojer v. Wilkinson*, 15 La. Ann. 497, 77 Am. Dec. 194; *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199.

ed his rights, in the absence of grant or prescription, and is guilty of a trespass.²⁷

(3) Where the flow is in no defined channel, either natural or artificial. This case is the most difficult, and there is considerable divergence of opinion upon the rights of the parties. Upon this question, the rules of the civil and the common law are opposed to each other.

According to the civil-law rule, the upper proprietor is naturally entitled to the natural drainage, and the lower proprietor cannot by the erection of dams, embankments or buildings obstruct the flow of the water upon his land.²⁸

Under the common-law rule, surface water is regarded as a "common enemy." It is a case of "sauve qui peut"; and each proprietor may rid his land of surface water as best he can, or protect his land from its languid and irresponsible flow as he can, without regard to the rights of others.²⁹ Perhaps railway embankments furnish the most usual instances of the application of one or the other of these rules.

It is to be observed that, whatever the rights of the upper proprietor may be with respect to the drainage of the surface water, the

²⁷ *Butler v. Peck*, 16 Ohio St. 335, 88 Am. Dec. 452; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179. See, also, cases cited supra, note 25; *Jackman v. Arlington Mills*, 137 Mass. 277; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Rhoads v. Davidheiser*, 133 Pa. 226, 19 Atl. 400, 19 Am. St. Rep. 630; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Mizzell v. McGowan*, 125 N. C. 439, 34 S. E. 538; *Yerex v. Eineder*, 86 Mich. 24, 48 N. W. 875, 24 Am. St. Rep. 113; *Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150.

²⁸ *Delahoussaye v. Judice*, 13 La. Ann. 587, 71 Am. Dec. 521; *McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575; *Gray v. McWilliams*, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Porter v. Durham*, 74 N. C. 767; *Kauffman v. Griesemer*, 26 Pa. 407, 67 Am. Dec. 437; *Butler v. Peck*, 16 Ohio St. 335, 88 Am. Dec. 452; *Gilham v. Madison County R. Co.*, 49 Ill. 484, 95 Am. Dec. 627; *Boyd v. Conklin*, 54 Mich. 583, 20 N. W. 595, 52 Am. Rep. 831.

²⁹ *Norfolk & W. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517; *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837; *Gannon v. Hargadon*, 10 Allen (Mass.) 106, 87 Am. Dec. 625; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Curtiss v. Ayrault*, 47 N. Y. 73; *Bowlsby v. Speer*, 31 N. J. Law. 351, 86 Am. Dec. 216; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276, note; *Beard v. Murphy*, 37 Vt. 99, 86 Am. Dec. 693; *Chadeayne v. Robinson*, 55 Conn. 345, 11 Atl. 592, 3 Am. St. Rep. 55; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Pettigrew v. Village of Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581; *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563; *Rowe v. St. Paul, M. & M. Ry. Co.*, 41 Minn. 384, 43 N. W. 76, 16 Am. St. Rep. 706.

authorities seem agreed upon the proposition that he has no right to pollute it while on his land and then allow it to drain, even in natural channels, upon his neighbor's land, and he is liable for injuries to the latter caused thereby³⁰—even, it seems, though he is guilty of no negligence.³¹

§ 120. **Same—Right of Drip from Eaves of a House.** The right to have the water drip from the eaves of one's house upon the adjoining land of another, though one branch of the subject of the drainage of surface water, is to be distinguished from the drainage of surface water from land itself, just as the lateral support of buildings is to be distinguished from the lateral support of land;³² the distinction being that the right of drainage from land is a natural right, while the easement of drip from a building must be acquired by grant or prescription.³³

On the other hand, the owner of the underlying land, who uses the drip from another's eaves to supply his cistern or for other purposes, though such user of the drip is exercised uninterruptedly for twenty years, can lay no claim to an easement therein by prescription, for he is making no adverse use of the other's property. The owner of the house may after any period make alterations in his roof, though he thereby stops the drip entirely.³⁴

§ 121. **7. Pews in Churches and Cemetery Rights.** There is some conflict of opinion whether the right to occupy a pew in a church is an easement, and, as such, real property, or whether it is to be regarded as personalty; but the great weight of authority is in favor of its being an easement and real estate,³⁵ the ownership

³⁰ *Jutte v. Hughes*, 67 N. Y. 267; *Gawtry v. Leland*, 31 N. J. Eq. 385; *Crosland v. Pottsville Borough*, 126 Pa. 511, 18 Atl. 15, 12 Am. St. Rep. 891; *City of Jacksonville v. Lambert*, 62 Ill. 519; *Winn v. Village of Rutland*, 52 Vt. 481.

³¹ *Rylands v. Fletcher*, L. R. 3 H. L. 330.

³² Ante, §§ 113, 114.

³³ *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688; *Vincent v. Michel*, 7 La. 52, 26 Am. Dec. 496. This is distinct from the further question whether or not the fact that the eaves of one's house overhangs the land of another (who would ordinarily own *ab solo usque ad coelum*) constitutes an adverse possession of the underlying land on the part of the owner of the house. Twenty years' enjoyment may give a prescriptive right of drip in such case without conferring a title to the land itself by adverse possession, and would not do so if the owner of the house during the prescriptive period claimed nothing more than the right of drip. *Carbrey v. Willis*, *supra*; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80.

³⁴ 2 *Washburn*, Real Prop. 74; *Arkwright v. Gell*, 5 M. & W. 203; *Magor v. Chadwick*, 11 Ad. & E. 571; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Napier v. Bulwinkle*, 5 Rich. Law (S. C.) 311.

³⁵ *Trustees of Third Presbyterian Congregation v. Andruss*, 21 N. J. Law, 325; *First Baptist Society v. Grant*, 59 Me. 245; *Gamble's Succession*, 23 La.

of the church itself and of the land it occupies being in the trustees or the church corporation. The owner of the pew is not a tenant in common of the land or church.³⁶

In England this easement is frequently regarded as appurtenant to a particular mansion house in the parish.³⁷ But in this country it is usually considered an easement in gross.³⁸

While the pewholder has an exclusive right to the use of his pew for special purposes, he has no vested right in the continuance of worship at that place, or in the continued existence of the church itself, provided the cessation of worship or the sale or demolition of the structure was reasonably necessary, or by act of God, or by accident.³⁹ Nor is he authorized to change or decorate the pew according to his fancy, nor to tear it down or injure it, his right being only to occupy it; nor can he prevent the congregation from rebuilding the church, or making such internal repairs and alterations as may be deemed proper.⁴⁰

Ann. 9; Attorney General v. Federal Street Meetinghouse, 3 Gray (Mass.) 1; Kimball v. Second Congregational Parish, 24 Pick. (Mass.) 347; Trustees of First Baptist Church v. Bigelow, 16 Wend. (N. Y.) 28; Price v. Lyon, 14 Conn. 280; Barnard v. Whipple, 29 Vt. 401, 70 Am. Dec. 422. But see Church v. Wells, 24 Pa. 249.

³⁶ Trustees of Third Presbyterian Congregation v. Andruss, 21 N. J. Law, 325; Attorney General v. Federal Street Meetinghouse, 3 Gray (Mass.) 1; In re Proprietors of New South Meeting House, 13 Allen (Mass.) 497; Sohler v. Trinity Church, 109 Mass. 1; First Baptist Society v. Grant, 59 Me. 245; Woodworth v. Payne, 74 N. Y. 200, 30 Am. Rep. 298; Trustees of First Baptist Church v. Bigelow, 16 Wend. (N. Y.) 28; First Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223; Wheaton v. Gates, 18 N. Y. 404; Kincaid's Appeal, 66 Pa. 411, 5 Am. Rep. 377; Jones v. Towne, 58 N. H. 462, 42 Am. Rep. 602.

³⁷ Hinde v. Charlton, L. R. 2 C. P. 104; Phillips v. Halliday, [1891] App. Cas. 228.

³⁸ 1 Tiffany, Real Prop. § 314. See ante, § 86.

³⁹ Sohler v. Trinity Church, 109 Mass. 1; Gorton v. Hadsell, 9 Cush. (Mass.) 508; Kimball v. Second Congregational Parish, 24 Pick. (Mass.) 347; Wheaton v. Gates, 18 N. Y. 395; Cooper v. Trustees of First Presbyterian Church, 32 Barb. (N. Y.) 222; Kincaid's Appeal, 66 Pa. 411, 422, 5 Am. Rep. 377; Kellogg v. Dickinson, 18 Vt. 266.

⁴⁰ Church v. Wells, 24 Pa. 250; Kincaid's Appeal, 66 Pa. 412, 5 Am. Rep. 377; Craig v. First Presbyterian Church, 88 Pa. 51, 32 Am. Rep. 417; Kimball v. Second Congregational Parish, 24 Pick. (Mass.) 347; In re Proprietors of New South Meeting House, 13 Allen (Mass.) 497, 517; Daniel v. Wood, 1 Pick. (Mass.) 102, 11 Am. Dec. 151. Upon the same principles the owners of tombs and vaults in churches possess only the exclusive right to bury their dead there, and have no title to the land or church. They cannot prevent a sale, demolition, or rebuilding of the church by the proper authorities of the congregation, nor the removal of the remains from the tombs when such removal is in other respects conducted according to law. Sohler v.

Upon analogous principles, where one purchases a burial lot in a cemetery, he does not buy the land itself, but only the right to use the lot for the purposes for which the land has been dedicated; no formal deed being necessary to confer this easement, which is to be enjoyed in the mode permitted and agreed upon by the rightful owner, if not unreasonable nor contrary to the terms of the original dedication.⁴¹ Every purchaser of a burial lot is affected with notice of the limitations placed upon his holdings by law and by the charter and by-laws of the company holding the title to the land, and he purchases his lot with the full knowledge and implied understanding that a change of circumstances may in time demand a change of location. Hence the soil may be sold in fee, discharged of all easements, if only the remains resting there be properly and lawfully removed.⁴²

Trinity Church, 109 Mass. 1. See *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 505.

⁴¹ *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 505; *Kincaid's Appeal*, 66 Pa. 420, 5 Am. Rep. 377; *Rayner v. Nugent*, 60 Md. 515; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481; *Silverwood v. Latrobe*, 68 Md. 620, 13 Atl. 161; *Rose Hill Cemetery Co. v. Hopkinson*, 114 Ill. 209, 29 N. E. 685.

⁴² *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506, 515, note; *Craig v. First Presbyterian Church*, 88 Pa. 42, 32 Am. Rep. 417; *Richards v. Northwest Protestant Dutch Church*, 32 Barb. (N. Y.) 42; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481; *Partridge v. First Independent Church*, 39 Md. 631; *Price v. Methodist Episcopal Church*, 4 Ohio, 515.

CHAPTER V.

LICENSES.

- § 122. Nature of a License.
- 123. Licenses Executory, Executed and Coupled with an Interest.
- 124. Creation of Licenses.
- 125. Assignability of Licenses.
- 126. Revocation of Licenses.
- 127. Same—Irrevocable Licenses.

§ 122. **Nature of a License.** Licenses, while not incorporeal hereditaments nor easements, nor, indeed, interests in land at all, are in many respects similar to easements and under certain conditions may become such.

A license is an authority conferred by the owner of land upon another to do an act or a series of acts upon the former's land, the licensee possessing no estate or interest in the land itself, or else an authority conferred upon the owner of servient land by one entitled to an easement therein to do an act or series of acts upon the servient land in obstruction of the easement,¹ including by implication an authority, in either case, to do whatever additional thing may be necessary to the accomplishment of the authorized act or acts.²

Thus, one may have a license to hunt or fish upon another's land, or to flood it, or to cut timber or gather fruit thereon, or to go upon another's land upon purchase of a ticket to witness a game, show or other spectacle, etc.³ So a license of the second class

¹ 2 Min. Insts. 28; 1 Washburn, Real Prop. 661; Wood v. Leadbitter, 13 M. & W. 837; Hawlins v. Shippam, 5 B. & Cr. 221; Liggins v. Inge, 7 Bing. 682; Cook v. Stearns, 11 Mass. 533; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Foster v. Browning, 4 R. I. 47, 67 Am. Dec. 505; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80; Addison v. Hack, 2 Gill (Md.) 221, 41 Am. Dec. 421; Vogler v. Geiss, 51 Md. 407; Stein v. Dahm, 96 Ala. 481, 11 South. 597; Peck v. Loyd, 38 Conn. 566; Morse v. Copeland, 2 Gray (Mass.) 302; Boston & P. R. Corp. v. Doherty, 154 Mass. 314, 28 N. E. 277; Cartwright v. Maplesden, 53 N. Y. 622. If no time be fixed wherein the license is to be exercised, it must in general be exercised within a reasonable time. Hill v. Hill, 113 Mass. 103, 18 Am. Rep. 455.

² Patrick v. Colerick, 3 M. & W. 483; Wood v. Manley, 11 Ad. & E. 34; Giles v. Simonds, 15 Gray (Mass.) 441, 77 Am. Dec. 373; Heath v. Randall, 4 Cush. (Mass.) 195; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80; Long v. Buchanan, 27 Md. 502, 92 Am. Dec. 653; Rogers v. Cox, 96 Ind. 157, 49 Am. Rep. 152; Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19; White v. King, 87 Mich. 107, 49 N. W. 518.

³ License to flood land, Woodward v. Seely, 11 Ill. 157, 50 Am. Dec. 445; to erect buildings, Crosdale v. Lanigan, 129 N. Y. 604, 29 N. E. 824, 26 Am. St. Rep. 551; to cut timber, Callen v. Hilty, 14 Pa. 286; to witness spectacle,

arises where one entitled to an easement of light over another's land, or entitled to flood it, gives authority to the servient owner to erect a structure on his own land which will obstruct the light or the flow.* And instances of implied licenses may be seen where upon a license to hunt, the hunter has an implied license to remove the game killed, or in the right to enter and remove trees which one has been authorized to cut down.⁵

The underlying theory of a license is in general (subject to qualifications to be noted later) that it confers a mere authority or permission, which is a matter of personal trust and confidence, and does not create any interest or estate in the land, like an easement. Hence, licenses are in general freely revocable by the licensor,⁶ are not usually transferable or assignable,⁷ and are not subject to the requirements of the statute of frauds as to the formalities of their creation.⁸

It is scarcely necessary to add that a license to do a particular act involves the implied condition that it should be done with due care and skill, and does not excuse the licensee from responsibility for damage to the licensor not contemplated by the parties, which is the result of the performance of the licensed acts in an unskillful or negligent manner.⁹

§ 123. Licenses Executory, Executed and Coupled with an Interest. Licenses may be said to be executory, when the acts authorized thereby are yet to be performed; and executed, when the acts have already been performed.

A license is coupled with an interest, when, accompanying a grant of an easement or profit à prendre, or other right to enter upon land for a particular purpose, or a grant of property upon such land, there is expressed or implied an authority or permission to act upon the land in a manner necessary for the complete operation of the grant, or complete enjoyment of the thing granted.

etc., *Wood v. Leadbitter*, 13 M. & W. 838; *McCrea v. Marsh*, 12 Gray (Mass.) 211, 71 Am. Dec. 745, 14 Harv. L. Rev. 455; to pass over land, *Forbes v. Balenseifer*, 74 Ill. 183; to use lodgings, no exclusive right to the premises being given, *White v. Maynard*, 111 Mass. 250, 15 Am. Rep. 28; *Wilson v. Martin*, 1 Denio (N. Y.) 602.

⁴ *Winter v. Brockwell*, 8 East, 308; *White v. Manhattan Ry. Co.*, 139 N. Y. 19, 34 N. E. 887; *Morse v. Copeland*, 2 Gray (Mass.) 302.

⁵ *Thomas v. Sorrell*, Vaughan, 330, 351; *Wood v. Leadbitter*, 13 M. & W. 838; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Metcalf v. Hart*, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122; *Long v. Buchanan*, 27 Md. 502, 92 Am. Dec. 653; *Miller v. State*, 39 Ind. 267.

⁶ Post, §§ 126, 127.

⁷ Post, § 125.

⁸ Post, § 124. • *Selden v. Delaware & H. Canal Co.*, 29 N. Y. 640.

Thus, where one is given the right, by way of profit à prendre, to enter upon another's land and cut timber, there is implied, if not expressed, a license to remove the timber when cut; and this is a license coupled with an interest or grant, since without the authority to remove the felled timber the grant of the timber would be worthless.¹⁰ Upon the same principle, if one places his chattels upon the land of another by the latter's permission, or purchases chattels already upon the vendor's land, he has an implied license in each case to remove the chattels from the land, and such license is coupled with an interest.¹¹

These distinctions are important in connection with the assignability and revocability of licenses, considered a little later.¹²

§ 124. Creation of Licenses. A license, not being an interest in land, does not come within the purview of the statutes of frauds in their provisions touching the conveyance of or contract to convey lands and interests therein. Hence a license may be created orally, in writing or under seal, or it may be implied, no particular formalities being necessary.¹³

§ 125. Assignability of Licenses. A license, being a mere personal trust and privilege, cannot ordinarily be assigned to another.¹⁴ But this general principle is subject to two qualifications, as follows:

(1) The servants or agents of the licensee may perform the authorized acts, whenever this was within the contemplation of the

¹⁰ *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *United Society v. Brooks*, 145 Mass. 410, 14 N. E. 622; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *White v. King*, 87 Mich. 107, 49 N. W. 518; *Bruley v. Garvin*, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839; *Cool v. Peters Box & Lumber Co.*, 87 Ind. 531.

¹¹ *Patrick v. Colerick*, 3 M. & W. 483; *Wood v. Manley*, 11 Ad. & E. 34; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Heath v. Randall*, 4 Cush. (Mass.) 195; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Long v. Buchanan*, 27 Md. 502, 92 Am. Dec. 653; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152.

¹² Post, §§ 125, 126, 127.

¹³ *Fletcher v. Evans*, 140 Mass. 241, 2 N. E. 837; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Noftsgar v. Barkdoll*, 148 Ind. 531, 47 N. E. 960; *Metcalf v. Hart*, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122; *Occum Co. v. A. & W. Sprague Mfg. Co.*, 34 Conn. 529; *Harmon v. Harmon*, 61 Me. 222; *Cutler v. Smith*, 57 Ill. 252; *Fischer v. Johnson*, 106 Iowa, 181, 78 N. W. 658; *Gowen v. Philadelphia Exchange Co.*, 5 Watts & S. (Pa.) 141, 40 Am. Dec. 489. See ante, § 122.

¹⁴ *Ackroyd v. Smith*, 10 C. B. 188; *Wickham v. Hawker*, 7 M. & W. 63; *Mendenhall v. Klinck*, 51 N. Y. 246; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Blaisdell v. Portsmouth*, G. F. & C. R. R., 51 N. H. 483; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484.

parties. Thus, where the license is to do an act on another's land, the performance of which would reasonably require the employment and assistance of other persons, as to build a house, or cut timber, etc., the employment of such persons is not a breach of the license.¹⁵

(2) If the license is coupled with an interest it is assignable with, and as part of, the interest, so that if one has chattels upon the land of another with his consent, since he has a license to remove them coupled with his interest in the chattels, that license will pass along with the chattels, should he assign the latter to a third person.¹⁶

§ 126. **Revocation of Licenses.** For the same reason as that given in the preceding section, viz., that a license is a mere personal trust or privilege, the general rule of law is that licenses are freely revocable at the option of the licensor, even though in doing so he violates the terms of a contract, and is liable in damages therefor; and the licensee becomes a trespasser and is liable as such if he enters upon the land after the revocation of his license.¹⁷ Thus, where A. and B. mutually gave each other a license to do acts upon the other's land, each was held to be a revocable license, though one had expended money on the other's land, relying upon such license.¹⁸

By the weight of authority, as well as upon principle, the licensee cannot continue to exercise an oral license after it has been revoked (though, if it is based upon contract, he may sue for the breach thereof), even though he has been at considerable expense in preparing to exercise, or in the actual enjoyment of, the license.¹⁹ Thus,

¹⁵ Wickham v. Hawker, 7 M. & W. 63; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80.

¹⁶ Bassett v. Maynard, Cro. (Eliz.) 819; Wickham v. Hawker, 7 M. & W. 63; Heffin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Sawyer v. Wilson, 61 Me. 529; Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398.

¹⁷ 1 Washburn, Real Prop. 663; Wood v. Leadbitter, 13 M. & W. 845; Fentiman v. Smith, 4 East, 107; Barksdale v. Hairston, 81 Va. 764; De Haro v. United States, 5 Wall. 599, 18 L. Ed. 681; Hodgkins v. Farrington, 150 Mass. 19, 22 N. E. 73, 5 L. R. A. 209, 15 Am. St. Rep. 168; McCrea v. Marsh, 12 Gray (Mass.) 211, 71 Am. Dec. 745; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80; Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Fluker v. Georgia Railroad & Banking Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; Wood v. Michigan Air Line R. Co., 90 Mich. 334, 51 N. W. 263; Seidensparger v. Spear, 17 Me. 123, 35 Am. Dec. 234; Johnson v. Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

¹⁸ Dodge v. McClintock, 47 N. H. 383. The fact that a consideration was paid for the license is immaterial. Wood v. Leadbitter, 13 M. & W. 838; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Dark v. Johnston, 55 Pa. 164, 93 Am. Dec. 732; Kivett v. McKeithan, 90 N. C. 106. But see Fluker v. Georgia Railroad & Banking Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328.

¹⁹ 1 Washburn, Real Prop. 666; Kerrison v. Smith, [1897] 2 Q. B. 445;

where the licensee at some expense cut a drain in the land of the licensor to bring water, enjoying the privilege for several years, after which the licensor revoked the license, it was held that the licensee was without a remedy.²⁰ So, when the license was to build a house or a dam upon the land of another, the licensee has been held bound to remove it upon a revocation of the license, without right to claim compensation for the loss.²¹

This conclusion is denied by some of the courts which seem disposed to hold that, by his acquiescence in the expenditure, the licensor is estopped to revoke the license, or at least should reimburse the licensee before revoking it, which is in effect to convert the license into an easement or interest in the land itself, which if the license is oral would be in contravention of the statute of frauds.²²

It seems, however, to be admitted that if the transaction be one which, if it were under seal, would create an easement, it being classed as a license merely because it is oral, upon a part performance thereof by the licensee by the expenditure of money or otherwise, a court of equity may regard it as an equitable easement, and therefore irrevocable.²³

McCrea v. Marsh, 12 Gray (Mass.) 211, 71 Am. Dec. 745; *Hodgkins v. Far-
rington*, 150 Mass. 19, 22 N. E. 73, 5 L. R. A. 209, 15 Am. St. Rep. 168;
Crosdale v. Lanigan, 129 N. Y. 604, 29 N. E. 824, 26 Am. St. Rep. 551; *Hous-
ton v. Laffee*, 46 N. H. 505; *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl.
933, 31 Am. St. Rep. 702; *Richmond & D. R. Co. v. Durham & N. R. Co.*,
104 N. C. 658, 10 S. E. 659; *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406,
78 N. W. 338; *Thoenke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030; *Minneapolis
Mill Co. v. Minneapolis & St. L. Ry. Co.*, 51 Minn. 304, 53 N. W. 639; *Pitz-
man v. Boyce*, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 537.

²⁰ *Hawkins v. Shippam*, 5 B. & Cr. 221; *Cocker v. Cowper*, 1 Cr., M. &
R. 418; *Foot v. New Haven & N. Co.*, 23 Conn. 223; *Sampson v. Burnside*,
13 N. H. 264.

²¹ *Bachelor v. Wakefield*, 8 Cush. (Mass.) 252; *Smith v. Goulding*, 6
Cush. 155; *Stevens v. Stevens*, 11 Metc. (Mass.) 251, 45 Am. Dec. 203; *Jack-
son v. Babcock*, 4 Johns. (N. Y.) 418; *Mumford v. Whitney*, 15 Wend. (N.
Y.) 380, 30 Am. Dec. 60; *Benedict v. Benedict*, 5 Day (Conn.) 464; *Addison
v. Hack*, 2 Gill (Md.) 221, 41 Am. Dec. 421; *Prince v. Case*, 10 Conn. 378,
27 Am. Dec. 675; *Trammell v. Trammell*, 11 Rich. Law (S. C.) 474; *Cowles
v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287.

²² The following decisions hold a license irrevocable in such a case:
Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; *Ferguson v. Spencer*, 127 Ind.
66, 25 N. E. 1035; *Rerick v. Kern*, 14 Serg. & R. (Pa.) 267, 16 Am. Dec.
497; *Drew v. Peer*, 93 Pa. 234; *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep.
582; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; *Wilson v. Chalfant*,
15 Ohio, 248, 45 Am. Dec. 574; *Flickinger v. Shaw*, 87 Cal. 126, 25 Pac. 268,
11 L. R. A. 134, 22 Am. St. Rep. 234; *Metcalf v. Hart*, 3 Wyo. 513, 27 Pac.
900, 31 Pac. 407, 31 Am. St. Rep. 122.

²³ 1 *Washburn*, Real Prop. 669; *Devonshire v. Eglin*, 14 Beav. 530; *Mc-
Manus v. Cooke*, 35 Ch. Div. 681; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38

It is to be observed that if the license has been executed by the performance of the acts authorized, or some of them, a subsequent revocation of the license will not make the licensee responsible for the acts already done, nor for the consequences thereof, even though such consequences continue to cause damage after the revocation, unless the licensee has had reasonable time and opportunity to avert them.²⁴

As to the modes of revocation, it is enough to say that the license may be revoked either by an instrument under seal or in writing, or orally, or by implication from the acts and conduct of the licensor, the essential question being, has the licensor intended to revoke.²⁵

Thus such intention may be implied from the licensor's transfer of the land to a stranger;²⁶ and the death of the licensor revokes the license (unless it be coupled with an interest), since the license is personal on both sides, and the licensee cannot plead the license of the ancestor for a trespass upon the land of the licensor's heir or devisee.²⁷

§ 127. Same—Irrevocable Licenses. There are two classes of cases wherein it seems to be agreed that licenses may become irrevocable. They are as follows:

(1) If the license is to do an act upon the licensee's own land, in obstruction of an easement therein, if the act be permanent, such as

Am. Rep. 479; *St. Louis Nat. Stock Yards Co. v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243; *Johnson v. Skillman*, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

²⁴ *Smith v. Goulding*, 6 Cush. (Mass.) 155; *Stevens v. Stevens*, 11 Metc. (Mass.) 251, 45 Am. Dec. 203; *Pratt v. Ogden*, 34 N. Y. 20; *Selden v. Delaware & H. Canal Co.*, 29 N. Y. 639; *Foot v. New Haven & N. Co.*, 23 Conn. 214.

²⁵ *Wood v. Leadbitter*, 13 M. & W. 838; *Hodgkins v. Farrington*, 150 Mass. 19, 22 N. E. 73, 5 L. R. A. 209, 15 Am. St. Rep. 168; *Carleton v. Redington*, 21 N. H. 291, 311; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Pitzman v. Boyce*, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536; *Fluker v. Georgia Railroad & Banking Co.*, 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; *Forbes v. Balenseifer*, 74 Ill. 183; *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658.

²⁶ *Wallis v. Harrison*, 4 M. & W. 538; *Drake v. Wells*, 11 Allen (Mass.) 141; *Vollmer's Appeal*, 61 Pa. 118; *Seidensparger v. Spear*, 17 Me. 123, 35 Am. Dec. 234; *Houx v. Seat*, 26 Mo. 178, 72 Am. Dec. 202; *Minneapolis W. R. Co. v. Minneapolis & St. L. Ry. Co.*, 58 Minn. 128, 59 N. W. 983; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19.

²⁷ *De Haro v. United States*, 5 Wall. 599, 18 L. Ed. 681; *Hodgkins v. Farrington*, 150 Mass. 19, 22 N. E. 73, 5 L. R. A. 209, 15 Am. St. Rep. 168; *Bridges v. Purcell*, 18 N. C. 492; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509; post, § 127. See 14 Harv. Law Rev. 73; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232.

the erection of a building and it is actually performed, the license cannot thereafter be revoked.²⁸

(2) The second instance of irrevocable licenses is to be found in the case of a license coupled with an interest. Thus when one has sold chattels situated upon his own land, the sale implies a license to the purchaser to come upon the land to take and carry the chattels away, which the vendor cannot revoke until at least a reasonable opportunity has been offered to the purchaser to take them away.²⁹ So, if one gives another an oral license to cut trees on his land at an agreed price, to be carried away, after the trees have been cut the vendor cannot revoke the license to remove such trees, since the licensee has acquired an interest in the trees by the fact of severance.³⁰ Whether or not, before severance, the license to remove the trees becomes irrevocable depends upon whether the oral transaction between the parties passes title to the growing trees. In most jurisdictions it does not.³¹ Under this view, until severance the landowner may revoke the license, and a conveyance of the land to a third person would constitute such a revocation, as soon as known to the licensee, who would then become a trespasser should he afterwards cut the trees.³²

So, also, if the license be coupled with an interest, the death of the licensor will not operate a revocation thereof, though it is otherwise if the license be not coupled with an interest.³³

²⁸ *Hawkins v. Shippam*, 5 B. & Cr. 221; *Winter v. Brockwell*, 8 East, 308; *Morse v. Copeland*, 2 Gray (Mass.) 302; *Boston & P. R. Co. v. Doherty*, 154 Mass. 314, 28 N. E. 277; *Cartwright v. Maplesden*, 53 N. Y. 622; *Vogler v. Geiss*, 51 Md. 407; *Addison v. Hack*, 2 Gill (Md.) 221, 41 Am. Dec. 421; *Stein v. Dahm*, 96 Ala. 481, 11 South. 597. See *Peck v. Loyd*, 38 Conn. 566.

²⁹ *Wood v. Manley*, 11 Ad. & E. 34; *Wood v. Leadbitter*, 13 M. & W. 856; *Heath v. Randall*, 4 Cush. (Mass.) 195; *Nettleton v. Sikes*, 8 Metc. (Mass.) 34; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Long v. Buchanan*, 27 Md. 502, 92 Am. Dec. 653. And so if one by the consent of a landowner places his chattels on another's land. *Patrick v. Colerick*, 3 M. & W. 483; *Giles v. Simonds*, *supra*; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80.

³⁰ *United Society v. Brooks*, 145 Mass. 410, 14 N. E. 622; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Bruley v. Garvin*, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839; *White v. King*, 87 Mich. 107, 49 N. W. 518; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19.

³¹ *Ante*, § 40.

³² *Roffey v. Henderson*, 17 Q. B. 586; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Drake v. Wells*, 11 Allen (Mass.) 143, 144; *Town v. Hazen*, 51 N. H. 596; *Wescott v. Delano*, 20 Wis. 516, 517.

³³ *Ante*, § 126. See *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232.

DIVISION III.

THE VARIOUS ESTATES OR INTERESTS IN REAL PROPERTY.

§ 128. **Preliminary Outline of Discussion.** The term "estate" in real property law is to be carefully distinguished on the one side from corporeal property itself,³⁴ and on the other from the "title" by which property is acquired and held; the latter indicating the evidence of ownership (as where one acquires land by deed or will) or the channel through which it is acquired, as where one obtains property by prescription, descent, occupancy, accretion, etc.³⁵

The legal signification of the term "estate" (status) is the relation in which one stands with regard to his property, or the interest he has therein.³⁶ These relations or interests may be of various sorts and degrees, several of which may coexist in the same land in the hands of several persons. Some illustrations may make this clearer:

(1) A., owning land in fee simple, leases it to B. for the latter's life or for a term of years; B. subleasing it to C. for a lesser period still.³⁷ Here we have three persons, each having a different estate or interest (in respect of quantity or duration) in the same land at the same time; A.'s interest or estate being a fee simple, B.'s being an estate for life or for years, as the case may be, and C.'s being an estate for a smaller number of years than B.'s. It is further to be observed (in respect of the time of enjoyment of the possession of the land) that C. alone has the present possession of the land during his term, but B. and A. nevertheless still have the estate for years or life estate and the fee simple, which each had before, subject to the interests that have been carved out of them. Until, however, the land itself comes into the actual possession of B. and A., respectively, their estates are future estates only, while C. has a present estate. The future estates of B. and A. are known as "reversions," being what is left in them after granting out the lesser estates.

(2) If G. gives land to C. for ten years, the land then to go to B.

³⁴ It is sometimes used popularly, but incorrectly, to indicate the corporeal property itself, as where one, viewing a farm, pronounces it to be "a fine estate."

³⁵ The various titles by which one acquires real property are considered hereafter in Division IV of this work. See post, § 784 et seq.

³⁶ 2 Min. Insts. 79.

³⁷ In this case B.'s "estate" is for life or for years, as the case may be; his "title" is under the lease by A.

for life, and after B.'s death to go to A. in fee simple, C. has present estate for years (ten years) in possession; B. an estate for life, the enjoyment of which by actual possession is in futuro, though the ownership thereof is in præsentī; and A. an estate in fee simple, future as to enjoyment, though present as to ownership, like B.'s estate. The future estates of B. and A., respectively, are termed "remainders," being what is left of G.'s entire grant, after the preceding estate to C. has been disposed of.

(3) Again, land may be given to A. in fee simple, but in trust for B. in fee simple. Here both A. and B. have fee-simple estates (in respect of the quantity of estate), but in respect of quality their estates are widely different. A. is a trustee, and has the legal estate (recognized by the courts of law), but no beneficial interest, which is entirely vested (under the direction of the courts of equity) in B., the cestui que trust or equitable owner.

(4) Land may be given to A. in fee simple, but upon a condition, the noncompliance with which may cause a forfeiture of the estate; or A. may place a lien upon the land held by him in fee simple; either of which circumstances will qualify A.'s otherwise absolute fee simple estate.

(5) Once more, A., B., and C., instead of possessing successive interests at the same time in the same tract of land, as in the first two examples above given, may have simultaneous rights to the possession of the same tract, as where land is conveyed to A., B., and C. as joint tenants or tenants in common thereof, etc.

In the first and second examples above mentioned, the estates or interests of the parties are viewed from the standpoints of the quantity or duration of the estate, and of the time of its enjoyment, whether in præsentī or in futuro; in the third and fourth examples, from the standpoint of the quality or the qualifications which may be attached to an interest in land; and in the fifth, from the standpoint of the community of interests which may be created therein.

These four viewpoints supply the four great heads under which the whole subject of Estates in Land may be appropriately discussed. Hence this section of the work will be divided into four parts, as follows:

Part I. The various estates in land, as respects their quantity or duration.

Part II. The various estates in land, as respects the quality or the qualifications of interest.

Part III. The various estates in land, as respects the time of their enjoyment (present or future).

Part IV. The various estates in land, as respects the community of interests therein.

PART I.

THE VARIOUS ESTATES IN LAND, AS RESPECTS THEIR QUANTITY OR DURATION.

CHAPTER VI.

THE SEISIN.

- § 129. The Freehold.
- 130. Seisin.
- 131. Various Sorts of Seisin.
- 132. "Livery of Seisin" and "Grant."
- 133. Origin of Livery of Seisin.
- 134. Nature of Livery of Seisin.
- 135. Disseisin.
- 136. Abeyance of the Freehold.
- 137. Classification of Estates of Freehold and Estates Less than Freehold.

§ 129. **The Freehold.** Under the feudal system the dignity and influence of the feudatory depended in part upon the nature of the services (free or base) which might be demanded of him and which gave character to the tenure by which he held the land.¹ But it also depended in no small measure upon the quantity of interest he was to enjoy in the land.

No interest in land was anciently regarded as worthy the acceptance of a freeman and a soldier unless it were an estate which might at least last for life, and was not held at the will of another. If the interest were of this kind it was and still is known as a freehold estate (*liberum tenementum*), which may be defined as an estate of indeterminate duration, other than an estate at will or by sufferance.²

By the very terms of this definition it does not include an estate held merely at the will of another,³ nor estates by sufferance;⁴ nor does it comprehend estates for years or "chattels real," since the utmost duration of such an estate is definitely fixed and not indeterminate. All these are estates "less than freehold."⁵

But it includes the fee-simple estate, since it lasts forever, and all other estates of inheritance, that is, estates capable of being inherited by the heirs or heirs of the body of the owner upon his death.⁶ It

¹ Ante, §§ 4, 6.

² 2 Min. Insts. 80; 1 Washburn, Real Prop. 29; 1 Th. Co. Lit. 621, note (C).

³ For estates at will, see post, § 335 et seq.

⁴ For estates by sufferance, see post, § 343 et seq.

⁵ Post, §§ 137, 317.

⁶ Post, §§ 137, 138, 157, 162, 165, et seq.

includes also an estate for the life of the tenant, or for the life of another, or any estate of uncertain duration which may last during the tenant's life, though liable to be terminated sooner by the happening of some contingency.⁷

Thus, not only is a fee simple given to A. and his heirs a freehold estate, but so, also, is an estate given to A. for his life, or to A. for the life of B., or to A. during coverture or *durante viduitate* (during widowhood), or to A. as long as he resides abroad or until he returns from Europe. All these are estates of indeterminate duration, and are therefore freehold estates. So, also, a lease for as many years as B. shall live confers a freehold estate.⁸

But if the estate be of defined duration, it is not a freehold, though it may possibly endure during the tenant's entire life, or even though it may by its terms be terminated by the tenant's death. Thus, an estate to A. for five hundred years, though it must necessarily outlast the tenant's life, is not a freehold, but a term for years or chattel real, for it is of defined duration. And a lease "for one hundred years if A. shall so long live" is also an estate of defined duration, and therefore not a freehold but a term for years, though it may, and probably will, terminate with A.'s death before the lapse of the hundred years.⁹

Furthermore it is to be observed that a freehold estate can never be carved out of a chattel interest or out of an estate of defined duration (which is always, in the eye of the law, less than a freehold) for the obvious reason that the less cannot contain the greater. Hence, if A. has an estate for years, though it be for a thousand years, and gives it to B. for life, or if he gives B. for his life a diamond ring or a certificate of stock or a bond, B.'s interest in each of these cases is a life interest in personal property and is itself personalty, and not a freehold estate (which is always real property).¹⁰

The common law recognized no interest in land to be "real property" unless it were a freehold, and no one as the actual owner of land unless he were a tenant of the freehold. He alone was "the tenant" under the feudal system. He alone could be called upon to render military service, and he alone could sue and be sued in a real action in respect to the title.¹¹

But with the abolition of the feudal system and its incidents, the term "freehold" has come to signify merely the quantity of in-

⁷ 2 Min. Insts. 100; 2 Bl. Com. 104, 121; 1 Washburn, Real Prop. 29.

⁸ 2 Min. Insts. 100, 191.

⁹ 2 Min. Insts. 191; 2 Bl. Com. 143; 1 Th. Co. Lit. 628, 632.

¹⁰ 2 Min. Insts. 192.

¹¹ 2 Min. Insts. 83; 2 Bl. Com. 107, note (7); 3 Th. Co. Lit. 102, 103, note (G).

terest in the land, and has no reference to the quality or dignity of the possessor.¹²

§ 130. Seisin. The tenant of a freehold estate is said to be seised thereof. The terms "seised" and "seisin" signify respectively "possessed of a freehold" and "possession of a freehold."¹³

The doctrine of seisin plays so prominent a part in the law of real property, even to-day, that it becomes necessary to examine it more closely.

Since the tenant of the freehold was looked to for the performance of the military and other services incident to the tenure, it followed upon grounds of public policy that there could be only one seisin at a time of a single tract of land. To have held otherwise would have been to divide the responsibilities, to render the title more or less uncertain, and materially to impair the efficiency of the feudal system. Hence, if land were granted to A. for life, remainder after A.'s death to B. and his heirs, while this would create a freehold estate for life in A., and also a freehold estate of fee simple in B., only A. would have the seisin or "the freehold." The seisin or immediate possession of the freehold would not vest in B. until after A.'s death. On the other hand, if the conveyance were "to A. for ten years, remainder to B. and his heirs," while A. would have the immediate possession of the land under his term for years, he would not have the seisin of the freehold, but B. would have the seisin, that is, the immediate freehold in possession.

Thus it will be seen that while the owner of the inheritance may be seised also of the immediate freehold in possession, it frequently happens that the inheritance is in one, while the freehold or seisin is in another.¹⁴

§ 131. Various Sorts of Seisin. At common law there were two sorts of seisin, seisin in deed (or in fact) and seisin in law.

(1) Seisin in deed, as it related to corporeal property, signified at common law the *pedis positio*; that is, the actual possession of the immediate freehold—not necessarily the actual possession of the land itself, for that might be in the possession of a tenant for years or at will.¹⁵ If the property of which the seisin is alleged be incorporeal, such as a profit à prendre, a rent or an easement, actual seisin of a freehold interest therein could only be shown by its actual exercise or use or the enjoyment of the fruits thereof, since the property

¹² 2 Bl. Com. 103.

¹³ 1 Washburn, Real Prop. 34, 35. One is not "seised" of a term for years, nor of an estate at will, nor of a chattel. One is "possessed" of these.

¹⁴ 2 Min. Insts. 83; 1 Washburn, Real Prop. 36, 37.

¹⁵ Ante, § 128; 2 Min. Insts. 122, 123.

itself is a mere intangible right, not capable of visible and tangible possession.¹⁶

But even at common law it was not necessary, in order to a seisin of an entire freehold, that the freeholder should be in actual occupation and enjoyment of every piece and parcel of the land, provided no one else was in adverse possession thereof. The actual occupation of a portion, with seisin given in the name of the whole, sufficed to vest the tenant with seisin of the whole, except as to so much as might be in the adverse possession of another.¹⁷ As to the part adversely held, the tenant would not have the seisin thereof, but merely a right of peaceable entry thereon or a right of action therefor, which is quite different from the seisin.¹⁸

After the enactment of the statute of uses and the statute of wills another sort of seisin in deed was recognized, namely a constructive seisin, as distinguished from the actual seisin required at common law for a seisin in deed or in fact. Such constructive seisin, however, could only exist as to land not in the adverse possession of another; the grantee or devisee, in the latter case, acquiring only "a right of entry or of action," if he would take anything.¹⁹

(2) Seisin in law, on the other hand, arises in the single instance of an heir acquiring land or incorporeal property by descent from an ancestor, and is confined to the period between the ancestor's death and the time the heir actually enters upon the land himself or by his agent or tenant, or, in the case of incorporeal property, the period between the ancestor's death and the heir's actual use or enjoyment of the property. After his entry upon the land or his enjoyment of the incorporeal property, the seisin in law is at once converted into seisin in fact.²⁰

§ 132. "Livery of Seisin" and "Grant." There were at common law various forms of conveyance appropriate to the transfer of different sorts of estates or interests in land, or, under varying circumstances, to the transfer of the same interest. Thus, a "feoffment"

¹⁶ Sheppard's Touchstone, 228; Co. Litt. 9a, 9b, 49a, 172a.

¹⁷ Thus, if the lands were situated all in one manor though consisting of different parcels, entry upon one in the name of all sufficed as to all, since the same pares curiæ were witnesses in respect to all the lands in that manor. But, if the parcels were in different manors, entry must have been made upon each. And so in later times, if lands were situated in different counties, there was required an entry upon the lands in each county to give an actual seisin thereof. 2 Min. Insts. 748; 1 Washburn, Real Prop. 32, 33, 35; 2 Bl. Com. 315, 316; 2 Th. Co. Lit. 335, 337.

¹⁸ 2 Min. Insts. 125, 141.

¹⁹ Post, § 213; 2 Min. Insts. 122, 123; 2 Bl. Com. 127; Leach v. Jay, 9 Ch Div. 42; Carpenter v. Garrett, 75 Va. 135.

²⁰ 2 Min. Insts. 124; 1 Th. Co. Lit. 559; 1 Washburn, Real Prop. 36.

was appropriate to the transfer of a fee-simple estate;²¹ a "gift" to the transfer or creation of a fee tail;²² a "lease," to the creation of any estate less than that owned by the grantor;²³ an "assignment," to the transfer of the entire interest of the grantor,²⁴ etc.

But in every case, if the interest transferred or created by the conveyance were a freehold interest in land, there was at common law an accompanying ceremony common to them all. That ceremony was the formal "investiture" of the transferee with the seisin of the land—a solemn function taking place in the presence of the other tenants upon the manor (*pares curiæ*) as witnesses. This ceremony consisted in the symbolical delivery of the possession of the land, through the delivery of a turf or twig or key or some other emblem of the land itself, and was called "livery of seisin" (that is, the delivery of the possession of the freehold).²⁵ Hence lands, as to the conveyance of the immediate freehold, were said at common law to "lie in livery."

Even at common law, however, if it were for any reason impossible to deliver the corporeal possession of the freehold, as where the property itself which was to be transferred was incorporeal, or was a remainder or reversion after a freehold estate in another²⁶ (so that the remainderman or reversioner, not having the seisin, could not deliver it to his transferee), it was sufficient, and indeed necessary to substitute a deed (technically called a "grant") in lieu of the solemn ceremony of livery of seisin.²⁷ Such property was said to "lie in grant, and not in livery," since it passed by grant or deed alone, and not by livery of seisin.

But the ceremony of actual livery of seisin was at best cumbersome and little adapted to the needs of a people advanced in the arts of civilization, so that it has long since been supplanted by the much more convenient constructive livery supplied by the statute of uses²⁸ and the statute of wills.²⁹

§ 133. Origin of Livery of Seisin. The practice of requiring livery of seisin to accompany the creation or transfer of freehold estates seems to have originated in the feudal ceremony of investiture.³⁰

²¹ Post, § 965.

²² Post, § 966.

²³ Post, § 967.

²⁴ Post, § 991.

²⁵ 2 Min. Insts. 745 et seq.

²⁶ See instances of such interests, ante, § 128.

²⁷ 2 Min. Insts. 777, 778, 422; 2 Bl. Com. 316, 317; 2 Th. Co. Lit. 356. So a release by a reversion or remainderman to the tenant of the freehold must have been by deed, post, § 976; and so with a confirmation by way of enlargement, post, §§ 989, 990.

²⁸ Post, § 397 et seq., § 673.

²⁹ Post, §§ 1003, 673.

³⁰ Something similar to this was practised in the East in the earliest

Investitures were doubtless designed at first to demonstrate in conquered countries the fact of the actual possession of the lord who assumed to donate the land, showing that he did not grant a bare litigious right (which the soldier tenant might be ill qualified to prosecute), but a peaceable and firm possession. And at a time when writing was little used a mere oral gift at a distance from the premises given was not likely to be either long or accurately retained in the memory of bystanders little interested in the transaction.³¹

That this ceremony should have been retained in the common law (the law of a wise and thoughtful, if unlettered, people) as a public and notorious act, whereby the country might take notice of and attest the transfer of the estate, and all parties concerned be secured and confirmed in their rights touching the same, was a suggestion of prudence too natural to be overlooked.³²

§ 134. **Nature of Livery of Seisin.** "There be," says Lord Coke, "two kinds of livery of seisin, viz., a livery in deed and a livery in law. A livery in deed is where the feoffer, taking the ring of the door, or a turf or twig of the land, delivereth the same to the feoffee in name of seisin of the land;" and a "livery in law is where the feoffer sayeth to the feoffee, being in view of the house or land, 'I give you yonder land, to you and your heirs, and go enter into the same and take possession accordingly,' and the feoffee doth accordingly, in the life of the feoffer, enter."³³

If, in the latter case, through fear of his life or bodily harm the feoffee dare not enter, his "continual claim," made yearly in due form of law as near to the lands as he dare go, sufficed at common law without an entry.³⁴

§ 135. **Disseisin.** Disseisin is the condition that results when the rightful owner of the freehold is deprived of his seisin by another. He is then said to be "disseised," and is termed a "disseisee," while the perpetrator of the wrong is termed a "disseisor."

A disseisin can be accomplished only by an actual occupation of at least a portion of the land, accompanied by an intention to oust the lawful occupant or to claim the land permanently as against the world.³⁵ A mere trespass upon the land, or the occupation thereof

times. Witness Abraham's purchase of the cave of Machpelah, Gen. xxiii, 17, 18; and the purchase by Boaz of the inheritance of Ruth's deceased husband. Ruth, iv, 7-9. See 2 Min. Insts. 746.

³¹ 2 Min. Insts. 746.

³² 2 Min. Insts. 746; 2 Bl. Com. 311.

³³ 2 Th. Co. Lit. 335, 346; 2 Min. Insts. 748; 2 Bl. Com. 315.

³⁴ 2 Min. Insts. 749; 2 Bl. Com. 316.

³⁵ 2 Min. Insts. 578; Brock v. Bear, 100 Va. 565, 42 S. E. 307. In the case of incorporeal rights, since such rights are incapable of actual corporeal possession, so, also, they are incapable of actual corporeal dispossession. A dis-

temporarily only, without intent to hold it permanently, is not a disseisin; nor is the intent to hold it permanently sufficient, if unaccompanied by an occupation of part of the land at least. The two must concur.³⁶

The effect of a disseisin is thus described by Mr. Preston: "It takes the seisin or estate from one man and places it in another. It is an ouster of the rightful owner of the seisin. It is the commencement of a new title, producing that change by which the estate is taken from the rightful owner and placed in the wrongdoer. Immediately after a disseisin, the person by whom the disseisin is committed has the seisin or estate, and the person on whom the injury is committed has merely the right or title of entry" or the right of action. "As soon as a disseisin is committed, the title consists of two divisions: First, the title under the estate or seisin (though unlawful); and secondly, the title under the former ownership."³⁷

Hence, while the disseisin converts the disseisee's former seisin into a mere right of entry or of action, it gives the disseisor a new title, the basis of which is the bare possession, which is defeasible by the disseisee by the exercise, within the period prescribed by law, of his right to enter upon the land or to recover the possession in an action at law.³⁸

At common law, however, the title of the disseisor while in possession was good to the extent that he might pass a *prima facie* title to a purchaser by feoffment with livery of seisin, or by fine or common recovery,³⁹ which might be defeated by the disseisee only through a tedious and expensive action at law. These forms of conveyance were regarded at common law as of such peculiar solemnity as to pass *prima facie* whatever estate they purported to pass, reducing the disseisee to disprove in a court of law the validity of the purchaser's title and depriving him of the summary and more convenient redress by way of peaceable entry. Hence these particular forms of conveyance were designated "*tortious conveyances.*"⁴⁰

So, also, at common law, if the disseisor died while in possession, his heir took his ancestor's title free from the right before existing in the disseisee to recover the seisin by a mere entry; the theory being that the disseisor, having to render the military services due upon the tenure, would fight better, knowing that if he fell

seisin of such rights can be established only by proof that the enjoyment of them has been usurped by another than the owner.

³⁶ 2 Min. Insts. 578 et seq.

³⁷ Preston, Abst. Tit. 284.

³⁸ 2 Min. Insts. 518 et seq.

³⁹ These conveyances are explained, post, §§ 282, 965; 2 Min. Insts. 991 et seq.

⁴⁰ Post, § 196; 2 Min. Insts. 598.

in battle his heir would be in a better position with respect to the title than he himself was—the same principle that now animates many of the governments of the world to pension the widows and children of soldiers who have fallen in battle. The common-law maxim controlling this case was: “*Descensus tollit seisinam*” (Descent tolls or takes away the right of entry); and the disseisee was left to the inconvenient redress by an action at law.⁴¹

§ 136. **Abeysance of the Freehold.** Since the immediate freehold could only be created or transferred at common law with livery of seisin—that is, with the delivery of the possession—it would have been an absurd self-contradiction to attempt with one breath to deliver the possession and with the same breath to postpone to a future date the enjoyment of that possession. Hence no principle of the common law was more firmly established than that a freehold estate could not be made to spring up or commence in futuro, unless there be an estate preceding it, to the owner of which livery might be made. The livery of seisin must take effect in *præsenti*, or not at all.⁴²

To the reason above mentioned may be added two others, viz.: (1) If the freehold were thus allowed to be in abeyance for a time—that is, in the immediate possession of nobody—there would be none to render the military services due under the feudal system; and (2) there would be none to sue or be sued for the title during such abeyance.⁴³

But by the statutes of uses and of wills, which, as will appear more fully hereafter,⁴⁴ dispense with actual livery of seisin at least, a conveyance of the freehold to take effect in the future, even though not preceded by another estate, does not put the freehold in abeyance, but leaves it still in the grantor until the time arrives or the event happens at which the possession is to go to the grantee. Such conveyances are therefore now freely allowed, and are termed “*Executory Limitations*.”⁴⁵

§ 137. **Classification of Estates of Freehold and Estates Less than Freehold.** In respect of quantity or duration, the great division of estates is, as has already been suggested, into freehold estates and estates less than freehold.

⁴¹ 2 Min. Insts. 519; 2 Bl. Com. 196, 197.

⁴² 2 Min. Insts. 83, 747. The qualification mentioned in the text, viz.: “Unless there is an estate preceding it to the owner of which livery might be made”—explains the existence at common law of freehold remainders such as are mentioned, ante, § 128.

⁴³ 2 Min. Insts. 83; 2 Bl. Com. 107, note (7); 3 Th. Co. Lit. 102, 103, note (G).

⁴⁴ Post, § 397 et seq., 673, 1003.

⁴⁵ 2 Min. Insts. 83, 431, et seq.; post, § 673 et seq.

Freehold estates are divided into (1) estates of inheritance, that is, estates of such duration as to be susceptible of descent upon the heir of the owner after the latter's death; and (2) freehold estates less than estates of inheritance, that is, estates of indeterminate duration (and therefore freeholds), but which cannot endure longer than during the life of some person, though sometimes terminable sooner, and therefore often referred to as life estates.

Estates of inheritance are classified as (1) Estates in fee simple; (2) estates in fee qualified, or base fees; (3) estates in fee conditional; and (4) estates in fee tail.

Freeholds less than estates of inheritance (or life estates) consist of (1) freeholds created by act of the parties; and (2) freeholds created by act of the law.

Life estates by act of the parties are classified as (1) estates for the tenant's own life; (2) estates for the life of another (*pur auter vie*); or (3) estates for an indeterminate period, which may or may not coincide with a life, as an estate during coverture, or *durante viduitate* (during widowhood), or as long as Z. resides abroad, or until Z. returns from abroad, etc.

Life estates by act of the law, are (1) estates tail after possibility of issue extinct; (2) estates by the curtesy; and (3) estates in dower.

Estates less than freehold are classified as follows: (1) Estates for years; (2) estates at will; (3) estates from year to year; and (4) estates by sufferance.

In tabulated form the classification of estates is as follows:

I. Estates of Freehold.

A. Estates of Inheritance.

1. Fee Simple.
2. Fee Qualified or Base Fee.
3. Fee Conditional.
4. Fee Tail.

B. Estates Not of Inheritance (Life Estates).

1. By Act of the Parties.
 - a. Estate for Tenant's Own Life.
 - b. Estates for Life of Another (*Pur Auter Vie*).
 - c. Estates Which May Last for Life, but Terminable by an Uncertain Event.
2. By Act of the Law.
 - a. Estates Tail after Possibility of Issue Extinct.
 - b. Curtesy.
 - c. Dower.

II. Estates Less than Freehold.

- A. Estates for Years.
- B. Estates at Will.
- C. Estates from Year to Year.
- D. Estates by Sufferance.

CHAPTER VII.

THE FEE SIMPLE.

- § 138. Nature and Extent of Fee-Simple Owner's Interest.
- 139. Origin and Growth of the Fee Simple.
- 140. Necessity for the Word "Heirs"—Usually Indispensable in Common-Law Conveyances.
- 141. "Heirs" Not Always a Word of Limitation.
- 142. Exceptions to Common-Law Rule Requiring "Heirs" in Transfer of Fee Simple—Enumeration.
- 143. I. "Heirs" Dispensed with in Case of Devises of Land.
- 144. II. "Heirs" Dispensed with in Exceptions (but Not in Reservations) in a Conveyance.
- 145. III. "Heirs" Dispensed with upon Reference to Another Deed Containing the Word.
- 146. IV. "Heirs" Dispensed with in Case of a Corporation Grantee.
- 147. V. "Heirs" Dispensed with in Case of Conveyance to a Trustee.
- 148. VI. "Heirs" Dispensed with in Release or Quitclaim Deeds.
- 149. "Heirs" Dispensed with by Statute.
- 150. Incidents of the Fee Simple—Enumeration.
- 151. I. Power of Alienation by Owner of Fee Well-Nigh Unlimited.
- 152. II. Fee Simple Descendible to the Heirs General.
- 153. III. Fee Simple Subject to Dower and Curtesy.
- 154. IV. Fee Simple Subject to Owner's Debts.
- 155. V. Fee Simple Subject at Common Law to Forfeiture for Treason and Felony.
- 156. VI. Fee Simple Subject to Escheat.

§ 138. Nature and Extent of Fee-Simple Owner's Interest. An estate in fee simple is the entire and absolute property of the subject-matter, and therefore when one grants such an estate he can make no further disposition of the property (save by way of substitution), for he has already granted the whole and entire interest that it is possible for him to have, and consequently nothing remains in him.¹

The substitution of another estate for a fee simple is at common law practicable only when the fee simple granted is a future and contingent estate, which happens not to vest, in which case another estate, a fee simple for example, may be limited to take its place; but the rules of the common law, hereafter explained, forbade the substitution of another estate in the room of a freehold estate that has once vested.²

The case of the substitution of a contingent fee simple, which never vests by reason of the failure to happen of the event upon which it is to vest, is variously designated at common law as the doctrine of concurrent fees, or of alternative remainders, or re-

¹ 2 Min. Insts. 80, 81.

² 2 Min. Insts. 81; post, § 473 et seq., 737.

mainders upon a double contingency, or remainders upon a contingency in a double aspect. For example, if a conveyance be made "to A. for life, remainder, if A. should die leaving issue, to B. and his heirs, but if A. die leaving no issue at his death to C. and his heirs," B. and C. would each have fee-simple estates, but contingent ones by way of remainder, so that C.'s fee simple is to take effect only in case B.'s fails to vest (by reason of A.'s leaving no issue at his death).³

But by conveyances operating, not at common law, but under the statutes of wills and of uses,⁴ whereby valid executory or future limitations unknown to the common law may be created, the substitution of one fee simple for another may be made even after the first is vested. It may be divested upon a subsequent contingency, and the property be transferred to another person in fee simple, the rationale of which will be hereafter explained.⁵

§ 139. Origin and Growth of the Fee Simple. The origin of the fee simple is to be found in the remote antiquity of the feudal age.

At the first introduction of feuds, as they were gratuitous, so, also, they were precarious, held at the mere will of the lord, who was the sole judge whether his vassal performed his services ably and faithfully.⁶

When the Teutonic hordes ceased to be migratory and began to covet fixed habitations, the notion of a more permanent tenure began to prevail. Advancing first to estates for fixed periods of short duration (one or two years), the feuds gradually came to be given for the life of the feudatory.⁷

The next step was to grant qualified estates of inheritance; that is, the feud was expressly permitted to pass to the heirs upon the feudatory's death, provided the lord consented that it should do so, the lord at first making it purely a matter of favor which of the tenant's children he would choose. The child preferred usually acknowledging the lord's good will by presents of horses, money, arms and the like. These presents were called reliefs, because they served to raise up (*relevare*) and re-establish the inheritance which had fallen by the feudatory's death.⁸

³ Post, § 595; 2 Min. Insts. 81; *Loddington v. Kime*, 1 Ld. Raym. 203; *Doe v. Burnsall*, 6 T. R. 30.

⁴ Post, § 675.

⁵ Post, § 680; 2 Th. Co. Lit. 87, note (L), 27, 768, Butler's note II; *Fearne*, Rem. 399 et seq., note (d).

⁶ 2 Min. Insts. 66.

⁷ 2 Min. Insts. 66; 2 Bl. Com. 55.

⁸ 2 Min. Insts. 66, 67; 2 Bl. Com. 55, 56; ante, § 7.

The last stage was the creation and recognition of unqualified estates of inheritance, which gradually grew up from the qualified estate above described. Feuds, if expressly granted to the feudatory and his heirs, came by degrees to be universally extended to the vassal's sons, or to such of them as the lord named, and the form of the donation was at this stage strictly followed. If limited to the vassal's heirs, the feud passed to the male lineal descendants in infinitum, and to none others (that is, to those succeeding generations only which were of the blood of the first feudatory). And originally the descent extended to all the sons alike, without distinction of primogeniture; but, the tendency of this rule being to divide the land and the corresponding responsibility for the feudal services into infinitesimal parcels, the feud began to descend to the eldest son in exclusion of all the rest.⁹ Finally, the term "heirs" came to include the collateral relatives of a deceased owner as well as his lineal descendants.¹⁰

The inheritable quality of the feud was confined, however, to grants to the feudatory and his heirs, the "heirs" being originally included as donees in the grant, so that in feudal times the tenant in fee simple was not permitted to alienate his estate without the consent of the heir presumptive; but this feudal rule was abrogated about the time of Henry III (A. D. 1216-1272), and since that time, while independently of statute the word "heirs" was still necessary to create an estate of inheritance, yet it ceased to signify that the "heirs" took any estate under the grant, the word merely describing or limiting the estate taken by the grantee.¹¹

§ 140. Necessity for the Word "Heirs"—Usually Indispensable in Common-Law Conveyances. As pointed out in the preceding section, it was a rule of the feudal law in the creation of feuds that the form of the donation was to be strictly followed, lest the lord be construed to give more than he designed. Hence it came to be an almost unbending rule of the common law that no estate of inheritance could be conveyed to a feudatory or tenant without the use of the word "heirs."¹²

In general, no circumlocution nor paraphrase will at common law take the place of the technical word "heirs" (or "heirs of the body"). Though the grantor's intention be ever so clear to transfer to the grantee an estate to endure forever, unless the conveyance

⁹ 2 Min. Insts. 67; 2 Bl. Com. 56.

¹⁰ 2 Bl. Com. 55 et seq., 107; *Cole v. Winnipisseogee Lake Cotton & Woolen Mfg. Co.*, 54 N. H. 242, 279.

¹¹ 2 Bl. Com. 289; 1 Washburn, Real Prop. 83, 84.

¹² 2 Min. Insts. 83, 84; 2 Bl. Com. 107, 108; 1 Th. Co. Lit. 493.

be in the technical form "to the grantee and his heirs," or "to the grantee and the heirs of his body," it passes nothing more, at common law, than a life estate.¹³

It will be observed that the word "heirs," when thus used in a conveyance, does not serve to vest any estate or interest in the heirs themselves. Its function, at least in modern times, is to mark out, limit, or describe the estate given to the grantee; and hence the word "heirs" so used in a conveyance is termed a word of limitation (in contradistinction to words of purchase, which create an estate in the person or persons indicated by the word of purchase). Thus, the words "children" and "sons" are not in general words of limitation, describing the estate given to the ancestor alone by the conveyance, but are words of purchase, vesting an estate in those persons. For example, if one conveys land "to A. and his heirs," A. takes a fee-simple estate and his sons take nothing by virtue of the conveyance; whereas, if the conveyance be "to A. and his sons," a joint estate for life would at common law be vested thereby in A. and his sons, and if "to A. and his sons and their heirs," A. and his sons would take a joint estate in fee simple.¹⁴

§ 141. "Heirs" Not Always a Word of Limitation. In order that the word "heirs" used in a conveyance should be construed as a word of limitation, it must embrace not only the immediate descendants or relatives of the first or second generations, but it must be intended to extend to all future generations of successors, however remote. It must embrace within its scope an indefinite, if not infinite, succession of descendants or collaterals entitled to succeed each other in the inheritance throughout the ages.¹⁵ In this sense the term "heirs" or "heirs of the body" is strongly contrasted with

¹³ Thus a grant to one "in fee simple" would nevertheless carry only a life estate at common law. *Bridgewater v. Bolton*, 6 Mod. 106, 109; *Taylor v. Cleary*, 29 Grat. (Va.) 448. And so would a grant to one "and his successors and assigns forever," *Sedgwick v. Laffin*, 10 Allen (Mass.) 430; or to a grantee "and his generation so long as the waters of the Delaware shall run," *Foster v. Joice*, 3 Wash. C. C. 498, Fed. Cas. No. 4,974; or to one "and his executors, administrators, and assigns," *Clearwater v. Rose*, 1 Blackf. (Ind.) 137.

¹⁴ 2 Min. Insts. 84; 1 Th. Co. Lit. 496; 2 Th. Co. Lit. 145, note (P); *Fearne*, Rem. 149 et seq.; *Lewis Bowles' Case*, 11 Co. 80a; *Loddington v. Kime*, 1 Ld. Raym. 203, 1 Salk. 224; *Backhouse v. Wells*, 1 Eq. Abr. 184, pl. 27; *Brett v. Donaghe*, 101 Va. 788, 45 S. E. 324.

¹⁵ 2 Min. Insts. 84; *Fearne*, Rem. 178, 179; *Stokes v. Van Wyck*, 83 Va. 724, 731, 3 S. E. 387. "Heirs of the body" has the same general signification, save only that it embraces lineal descendants alone, and not collateral relatives. *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

"children" or "sons," etc., which for the most part embrace descendants of the first degree or generation only.¹⁶

But if the grantor's intention appear upon the face of the conveyance to use the term "heirs" as applicable only to particular relatives, or to a particular class or generation of relatives, not to the succeeding generations in indefinite succession, the word loses its character as a word of limitation, and becomes a word of purchase.¹⁷ Hence a conveyance "to A. and the heirs of his body now living" would not at common law pass an inheritance to A., but simply a joint estate for life to A. and such of his descendants as were living at the time of the conveyance.¹⁸

§ 142. Exceptions to Common-Law Rule Requiring "Heirs" in Transfer of Fee Simple—Enumeration. Notwithstanding the unbending character of this rule, there are several cases, even independently of statute, in which the word "heirs" may be dispensed with. It will suffice to note the following: (1) In case of devises of land; (2) in case of exceptions (but not reservations) in a conveyance; (3) in case of a grant of an interest by reference to another conveyance which uses the word "heirs"; (4) in case of a conveyance to a corporation; (5) in case of a conveyance to a trustee; (6) in case of a release or quitclaim deed. These will be considered in their order.

§ 143. Same—I. "Heirs" Dispensed with in Case of Devises of Land. Wills of land or devises were unknown to the feudal law, and, save by the custom of particular places, were not permitted in England until the statute of 32 Hen. VIII (A. D. 1541). By that time the rigor of feudal construction had begun to wear away, and hence the English judges felt somewhat more at liberty to disregard the rigorous technical rules applicable to common-law conveyances, and, in construing the newly authorized devises of land, to look more closely to the real intention of the testator than they had ever permitted themselves to do in the case of conveyances at common law. To this liberality they were further urged by the fact that a testator was often inops consilii in executing his will, thus making it necessary to choose between frustrating most devises for want of the proper technical words or dispensing with technical language and the legal certainty thereby engendered.¹⁹

One of the modifications, thus made by the courts in the case of devises, in the rigorous technical rules of construction applicable at common law to conveyances, was the dispensing with the word "heirs" in a devise in order to create an estate of inheritance, pro-

¹⁶ 2 Min. Insts. 84.

¹⁷ 2 Min. Insts. 84.

¹⁸ Taylor v. Cleary, 29 Grät. (Va.) 448.

¹⁹ 2 Min. Insts. 85; 2 Bl. Com. 108, note (11).

vided the testator's intent to create such an estate otherwise appear upon the face of the will. Any words showing the intent that the land shall descend in indefinite succession, after the devisee's death, to his successors, or indicating that the devisee is intended to take a perpetual estate, will suffice.²⁰

Thus, in wills (but not in deeds), such words as "issue," "descendants," "offspring," "seed," and the like, and even "children" and "sons," have frequently been held to be equivalent to the term "heirs of the body."²¹ So, a devise of "my estate" in lands (the testator owning the fee simple therein), or of "all my rights," or of "all my estate," or a devise to one "in fee simple" or "forever," have each and all been held to create in the devisee a fee-simple estate, though the word "heirs" be not used.²²

But unless the intent appears upon the face of the devise to give more than a life estate, the common-law rule applies to devises as to conveyances, and nothing but an estate for life passes. Thus, in case of a devise of Blackacre "to A." (without further words), A. takes only an estate for his life, just as if the transfer were by deed.²³

§ 144. Same—II. "Heirs" Dispensed with in Exceptions (But Not in Reservations) in a Conveyance. Attention has already been called to the distinction between an exception in a conveyance and a reservation.²⁴ A reservation, it will be remembered, vests in the grantor a new interest or right, growing or issuing out of the land conveyed (as in the case of the reservation of a rent or a profit à prendre), and coming into being after the conveyance. If it does not contain words of inheritance, it creates at common law only an estate for the life of the grantor.²⁵

The operation of an exception, on the other hand, is merely to retain in the grantor a portion of the property which, without it, would pass to the grantee under the general terms of the conveyance, and he holds the excepted portion as of his former title;

²⁰ 2 Min. Insts. 85; 2 Bl. Com. 108; *Wright v. Denn*, 10 Wheat. 204, 6 L. Ed. 303; *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692.

²¹ 2 Min. Insts. 84, 91; 2 Bl. Com. 114, 115; *Doe v. Collis*, 4 T. R. 299; *Knight v. Ellis*, 2 Bro. Ch. 578.

²² 2 Bl. Com. 108; *Davies v. Miller*, 1 Call (Va.) 127; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537, 29 Am. Dec. 621; *Newkerk v. Newkerk*, 2 Caines (N. Y.) 345; *Leland v. Adams*, 9 Gray (Mass.) 171; *Jackson v. Merrill*, 6 Johns. (N. Y.) 185, 5 Am. Dec. 213; *Lambert's Lessee v. Paine*, 3 Cr. 97; *Forsaith v. Clark*, 21 N. H. 409; *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692.

²³ *Jackson v. Wells*, 9 Johns. (N. Y.) 222. See, also, cases cited supra.

²⁴ Ante, § 94.

²⁵ 2 Min. Insts. 50, 51; *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352, 354.

no new title thereto being created in him. Hence no words of inheritance are necessary.²⁶

But the distinction between exceptions and reservations is so often found to be uncertain and obscure that the two expressions have to a great extent, at least in this country, come to be interchangeably employed. A reservation is often construed as an exception in order that the obvious intention of the parties may not be defeated.²⁷

§ 145. Same—III. "Heirs" Dispensed with upon Reference to Another Deed Containing the Word. The omission of words of limitation in a conveyance at common law may be supplied by a reference to some other conveyance which does contain the word "heirs."²⁸

Mr. Preston lays down the doctrine thus: "Words of direct and immediate reference will suffice. The word 'heirs,' or 'successors' [in case of a corporation grantee], need not be in the identical deed of grant or other mode of assurance by which the estate is granted or conveyed. Thus where one to whom lands have been granted in fee does, after reciting the grant or without any recital, grant the lands to another as fully as they were granted to him; or where a man grants two acres to A. and B., to hold one acre to A. and his heirs and the other to B. 'in form aforesaid' * * * —in these and like instances the fee simple will pass without limitation to the heirs in express terms. The fee passes by reason of the words of direct and immediate reference."²⁹

§ 146. Same—IV. "Heirs" Dispensed with in Case of a Corporation Grantee. Strictly speaking, there can be no "heirs" to a corporation, since it can never die. Hence that word is out of place when used in a conveyance to a corporation. In its stead the technical term "successors" is used, and is perhaps required in the case of a corporation sole in order to create a fee-simple interest. But if the grantee is a corporation aggregate, as is usually the case, the word "successors," even at common law, is of little importance, for although without it the estate created is at common law for the grantee's life only, yet corporations are or may be perpetual.³⁰

²⁶ *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352, 354; *Wood v. Boyd*, 145 Mass. 179, 13 N. E. 476; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290.

²⁷ *Ante*, § 94; *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352.

²⁸ *Com. Dig. Estate (A, 2)*; *Sheppard's Touchstone*, 101; *Evans v. Brady*, 79 Md. 142, 28 Atl. 1061, 1062.

²⁹ 2 *Preston*, Est. 2.

³⁰ 2 *Min. Insts.* 85; 2 *Bl. Com.* 109; 1 *Washburn*, Real Prop. 90; *Congregational Soc. v. Stark*, 34 Vt. 243; *Wilcox v. Wheeler*, 47 N. H. 488; *Overseers of Poor v. Sears*, 22 *Pick. (Mass.)* 126.

§ 147. **Same—V. "Heirs" Dispensed with in Case of Conveyance to Trustee.** It is a general maxim of the law, or rather of the courts of equity, that a trust will never be allowed to fail merely for want of a trustee, and hence the estate of the trustee is measured, not by the express terms of the grant to him, but by the extent of the estate limited to the beneficiary or cestui que trust. If the beneficial interest be given "to cestui que trust and his heirs," thus creating in him an equitable fee simple, the trustee will take a similar estate, though words of inheritance be omitted in his case. For, if the trustee were given only a life estate, the trust would fail at his death merely for want of a trustee.³¹

On the other hand, if an estate in the trustee less than a fee simple will suffice for the execution of the trust, the trustee's estate will be so limited, it is said, in spite of the language of the conveyance.³²

§ 148. **Same—VI. "Heirs" Dispensed with in Release or Quitclaim Deeds.** If the purpose of the conveyance be not to pass an interest directly to the grantee or to enlarge his estate, but merely to extinguish a right belonging to the grantor, there is no need of words of inheritance. In such case, the right once extinguished is forever extinguished, and cannot be revived by the releasee's death. Thus, if a disseisor releases his outstanding right to the disseisor,³³ or if one entitled to an easement, such as a right of way, release the same to the owner of the servient estate,³⁴ or if a joint tenant or coparcener convey his share of the land to a co-tenant by release,³⁵ in all these cases the word "heirs" may be dispensed with in the conveyance.

But if a tenant in common convey his share to a co-tenant, the conveyance operates to pass an estate to the grantee, which was not before in him, and hence only a life estate would pass to him at common law, unless there are words of inheritance.³⁶ And so, if a reversioner or remainderman in fee should release to the particular tenant without words of limitation, since the conveyance

³¹ 1 Washburn, Real Prop. 90; 1 Perry, Trusts, § 312 et seq.; Doe v. Con-
sidine, 6 Wall. 458, 18 L. Ed. 869; Gould v. Lamb, 11 Metc. (Mass.) 84, 45 Am.
Dec. 187; Wilcox v. Wheeler, 47 N. H. 488; Newhall v. Wheeler, 7 Mass. 189;
Bennett v. Garlock, 79 N. Y. 302, 35 Am. Rep. 517; Hawkins v. Chapman, 36
Md. 83. See Carney v. Kain, 40 W. Va. 758, 23 S. E. 650.

³² 1 Tiffany, Real Prop. § 20, and cases cited supra.

³³ Com. Dig. Estate (A, 2).

³⁴ 2 Preston, Est. 58.

³⁵ 1 Washburn, Real Prop. 89; Rector v. Waugh, 17 Mo. 13, 57 Am. Dec. 251.

³⁶ 2 Preston, Est. 56, 58; 1 Washburn, Real Prop. 89, 90; Rector v. Waugh,
17 Mo. 13, 57 Am. Dec. 251.

enlarges the estate of the particular tenant, only a life estate would at common law pass.³⁷

§ 149. "Heirs" Dispensed with by Statute. In many of the states statutes have been passed abrogating the requirement of words of inheritance to create an estate of inheritance.³⁸

It may perhaps be gravely doubted whether these statutes apply to interests arising by reservation to the grantor, which independently of statute, as we have seen, require words of inheritance.³⁹ Thus, if upon a lease of land in fee a perpetual rent is reserved payable to the lessor (without mentioning the heirs), the rent goes at common law, upon the lessor's death, neither to his heirs nor personal representatives, but ceases altogether.⁴⁰ It is not perceived how these statutes alter this result, unless their equity be supposed to extend to such a case.⁴¹

§ 150. Incidents of the Fee Simple—Enumeration. The incidents pertaining to the fee-simple estate may be enumerated as follows: (1) A well-nigh unlimited power of alienation on the part of the owner; (2) descendible to the heirs general; (3) subject to dower and curtesy; (4) subject to the owner's debts; (5) subject at common law to forfeiture for treason and felony; and (6) subject to escheat.

§ 151. Same—I. Power of Alienation by Owner of Fee Well-Nigh Unlimited. Under the feudal law, it will be remembered, the tenant of the fee simple, as well as of other freeholds, was not permitted to aliene his estate so as to deprive the lord of his military services, unless the lord assented thereto (which gave rise to the burdensome fines for alienation).⁴² The tenant of the fee simple could only subenfeoff his grantee, which subinfeudation did not terminate his responsibility for the feudal services to the lord of the fee, but merely made the tenant's grantee responsible to him (the tenant) for a proper rendition of them, while he remained responsible to the lord of the fee.⁴³

The system of subinfeudation, as well as the fine for alienation (except only as to the king's tenants in capite), was abolished by the statute of *quia emptores*, 18 Edw. I, which provided that the grantee of the fee-simple tenant should no longer hold of the gran-

³⁷ 2 Preston, Est. 62; 1 Washburn, Real Prop. 90.

³⁸ 1 Washburn, Real Prop. 56, note 2; 1 Tiffany, Real Prop. § 20.

³⁹ Ante, § 144.

⁴⁰ 2 Min. Insts. 50; Gilbert, Rents, 64, 65; 2 Th. Co. Lit. 413; Bac. Abr. Rents (H).

⁴¹ See 2 Min. Insts. 51.

⁴² Ante, § 12; 2 Min. Insts. 73; 2 Bl. Com. 72.

⁴³ Ante, § 5.

tor and be responsible to him for the feudal services while the grantor remained responsible, as before, to the lord of the fee, but that the tenant's grantee himself should thereafter hold of the chief lord of the fee. Since the enactment of that statute the tenant of the fee simple has possessed the complete *jus disponendi*, so far as the conveyance of the property is concerned.⁴⁴ But it was not until a much later period that the owner of the fee was given the untrammelled right to devise his land,⁴⁵ and to have it entirely subject to his debts.⁴⁶

But even at the present day the power of disposition by the fee-simple owner may be restricted within reasonable limits by the terms of the grant. A condition may be inserted that he shall not convey to a particular person or class of persons, or that he shall not aliene within a limited period; and if the grantee be a corporation it may in general be stipulated that the land shall not be aliened at all, because corporations are created for specific purposes, and such restrictions tend to confine them within the prescribed limits.⁴⁷

§ 152. Same—II. Fee Simple Descendible to the Heirs General. The fee simple, upon the death of the owner intestate, descends to his "heirs"; that is, to those persons named by the law as his successors, without other regard to sex, age or line of relationship than the law itself provides. Hence a conveyance "to A. and his heirs female" will create no preference in the female heirs over the heirs male, unless the law itself creates or permits such preference, as it does not in the case of the fee simple.⁴⁸

So a limitation "to A. and his heirs on the part of his mother" is of no effect to alter the line of descent.⁴⁹

⁴⁴ Ante, § 5; 2 Min. Insts. 54; 2 Bl. Com. 72; 1 Washburn, Real Prop. 84.

⁴⁵ The English statute of wills was passed in 32 Hen. VIII (A. D. 1541). See post, § 1002 et seq.

⁴⁶ See post, § 154.

⁴⁷ Post, § 516 et seq.; 2 Min. Insts. 86, 288, et seq.; 2 Th. Co. Lit. 25 et seq.; 1 Washburn, Real Prop. 85; Attorney General v. Merrimack Mfg. Co., 14 Gray (Mass.) 586; French v. Quincy, 3 Allen (Mass.) 9; Stuyvesant v. Mayor, etc., of City of New York, 11 Paige (N. Y.) 414; Southard v. Central R. Co. of New Jersey, 26 N. J. Law, 13; Pennsylvania R. Co. v. Parke, 42 Pa. 31; Warner v. Bennett, 31 Conn. 468; Grissom v. Hill, 17 Ark. 483.

⁴⁸ 1 Washburn, Real Prop. 93; 2 Bl. Com. 113 et seq.; 1 Th. Co. Lit. 547. It is otherwise in the case of the fee tail, where the sex of the heirs may be designated. Post, § 168. But a limitation in a devise to one and "his heirs male" has been held to create an estate tail male in the grantee. See Denn v. Slater, 5 T. R. 335; Den v. Fogg, 3 N. J. Law, 385; Cooper v. Cooper, 6 R. I. 261.

⁴⁹ 1 Washburn, Real Prop. 93; Co. Litt. 27, 130.

§ 153. **Same—III. Fee Simple Subject to Dower and Curtesy.** This incident is not peculiar to fee-simple estates, but is applicable to all estates of inheritance.⁵⁰ They are all in general subject to the curtesy or dower of the consort of the deceased owner, whenever the requisites therefor exist.⁵¹

§ 154. **Same—IV. Fee Simple Subject to Owner's Debts.** By the feudal law land held by feudal tenure was not subject to the debts of the owner, lest the debtor tenant be substituted, without the lord's consent, by one inimical to the lord's interests, and the feudal rule requiring the lord's consent to an alienation by the tenant be thus evaded and abrogated.⁵²

In process of time, however, the lands of a deceased owner became liable to his debts of record and to his debts of specialty (that is, under seal) expressly binding the heirs, provided the lands had descended upon the heir and had remained in his hands until suit was brought to enforce the debt.⁵³

By statute 13 Edw. I, c. 18, lands of a living debtor were allowed to be subjected upon a judgment against him under a "writ of elegit." This statute enacted that "when a debt should be recovered or a recognizance should be acknowledged in the king's court, or when damages should be adjudged, it should be in the election of the plaintiff to sue out a writ commanding the sheriff to make the debt or damages out of the goods and chattels of the debtor, or to deliver to the creditor all the chattels of the debtor (except oxen and beasts of the plough) and a moiety of his land, until the debt should be levied by a reasonable price or extent, and if the creditor were ejected from that tenement, he should recover the same by writ of novel disseisin and afterwards if need be by a writ of redisseisin."

The right of election given the creditor under this statute, and the entry upon the rolls after he had chosen this remedy—"quod elegit sibi executionem fieri de omnibus catallis et medietate terræ"—gave the writ of elegit its name.⁵⁴

Generally in this country land is, by statute, liable to sale on execution against the owner and is charged with the payment of his debts upon his death, provided his personal estate is not sufficient to pay them.

⁵⁰ Post, §§ 220, 249.

⁵¹ 2 Min. Insts. 86, 115 et seq., 135 et seq.

⁵² 2 Min. Insts. 302.

⁵³ 2 Min. Insts. 86; 2 Bl. Com. 161, 465, note (36); Bac. Abr. Heir (F); 1 Washburn, Real Prop. 92.

⁵⁴ 2 Min. Insts. 302; 2 Bl. Com. 161; Bac. Abr. Execution (C) 2.

§ 155. Same—V. Fee Simple Subject at Common Law to Forfeiture for Treason and Felony. An attainder or conviction of treason or felony, in addition to the corporal punishment inflicted, worked at common law a forfeiture of the culprit's lands—in the case of treason, forever; and in the case of felony (other than treason), for the life of the felon and a year and a day thereafter.⁵⁵

A further consequence at common law of an attainder of treason or felony was that the blood of one attainted was so corrupted as to lose its heritable quality. Hence, if an ancestor dies leaving no other heir than a person so attainted, the latter is at common law incapable of inheriting;⁵⁶ or if the ancestor is himself so attainted, his whole blood is corrupted, and there is none who may claim the land by reason of relationship to him, so that at common law the land escheats for want of heirs capable of inheriting.⁵⁷

In this country, by the Constitution of the United States, no attainder of treason (that is, treason against the United States) shall work corruption of blood or forfeiture of estate except during the life of the person attainted.⁵⁸ Previous to 1860 it was provided by act of Congress that no conviction or judgment for treason, murder, piracy, etc., should work corruption of blood or forfeiture of estate.⁵⁹ Since that time, however, especially during the period of the Civil War and immediately thereafter, forfeitures under the laws of the United States have been vastly multiplied, chiefly in connection with rebellion.⁶⁰

§ 156. Same—VI. Fee Simple Subject to Escheat. Escheat occurs whenever inheritable blood is lacking to inherit the fee, for it is a maxim of general policy that no property in a state should, if possible, be without an owner.

The feudal system made this principle peculiarly necessary in early days, it being essential that there should always be a tenant ready to render the military services. Hence it was regarded as one of the incidents of feudal tenure that if a tenant of the fee simple die leaving no heir, or none capable of inheriting the land, it escheats to the lord of the fee.⁶¹

⁵⁵ 2 Min. Insts. 87, 589; 2 Bl. Com. 267, 268.

⁵⁶ 2 Min. Insts. 556, 557; 2 Bl. Com. 251 et seq.

⁵⁷ 2 Min. Insts. 556, 557.

⁵⁸ 2 Min. Insts. 87; Const. U. S. art. 3, § 3, cl. 2. It will be observed that attainder of felony is not mentioned in this provision of the Constitution.

⁵⁹ 2 Min. Insts. 87; 1 Brightly, Dig. 221.

⁶⁰ 2 Min. Insts. 87; 2 Brightly, Dig. 199 et seq.; Alexander's Cotton, 2 Wall. 404, 17 L. Ed. 915; Armstrong's Foundry, 6 Wall. 769, 18 L. Ed. 882; Morris' Cotton, 8 Wall. 511, 19 L. Ed. 481; Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196, 20 Wall. 92, 22 L. Ed. 320.

⁶¹ Ante, § 13; 2 Min. Insts. 548, 549; 2 Bl. Com. 72, 73.

The want of inheritable blood may be due at common law to three causes: (1) The absolute absence of any legitimate heirs; (2) the alienage of such heirs; and (3) their attainder of treason or felony.⁶²

It is to be observed that no estate less than a fee simple (or a fee qualified) can escheat, for such lesser estate always supposes a reversioner or remainderman who possesses the ultimate fee, to whom the land may go without the necessity for an escheat. Thus, if a tenant in fee tail die without issue, or an estate for life terminates before its regular course is run, the land does not escheat, but in the first case goes over to the reversioner or remainderman, and is in the second case thrown open at common law to general or special occupancy, the nature of which will be explained hereafter.⁶³

In this country, while the feudal tenures do not in general exist, the same principle requires that land belonging to one who dies without heirs should escheat—not to the feudal lord, as there is none, but to the state itself.⁶⁴ And in this country generally there are statutory provisions authorizing escheat in such cases and prescribing the mode of procedure and the official who shall perform this function.

⁶²Ante, § 155. post, § 785; 2 Min. Insts. 555 et seq. 2 Bl. Com. 72, 73.

⁶³Post, § 807 et seq.

⁶⁴Ante, § 13.

CHAPTER VIII.

THE FEE QUALIFIED OR BASE FEE.

- § 157. Fee Qualified Distinguished from a Fee Simple.
- 158. Fee Qualified Distinguished from a Fee upon Condition.
- 159. Descendible Freeholds.
- 160. Quasi Reversion in Grantor after a Fee Qualified.
- 161. Incidents of the Fee Qualified.

§ 157. **Fee Qualified Distinguished from a Fee Simple.** A fee qualified or base fee, though an estate of inheritance, and at common law requiring, like a fee simple, the word "heirs" for its creation, is to be distinguished from the fee simple by the characteristic that it is liable to terminate regularly, not only upon a total failure of heirs (in which case it escheats, just as a fee simple would do), but also by running out its regular course without a failure of the tenant's heirs. It may by its general limitation continue forever, but it is subject to some further limitation by virtue of which it may terminate at any moment upon the occurrence of a designated contingency.¹

Thus, a conveyance, "to A. and his heirs, peers of the realm," or "to A. and his heirs, lords of the manor of Dale," or "to A. and his heirs as long as Z. shall have heirs of the body," or "to a town, as long as the judicial proceedings of the town shall be held on the premises," etc., are instances of fees qualified.²

§ 158. **Fee Qualified Distinguished from a Fee upon Condition.** While a fee qualified is liable to be terminated by the happening of some event before there is a total failure of heirs (which distinguishes it from a fee-simple absolute),³ care must be taken, on the other hand, to distinguish it from a fee simple upon condition, which is also liable to terminate by the happening of some event before the heirs are exhausted.

The distinction between the fee qualified and the fee simple upon condition is the distinction, hereafter to be noted, between a "common-law limitation" (or a "special limitation") and a "condition subsequent."⁴ Postponing a fuller explanation, it will suffice at this place to point out that a condition subsequent terminates an estate prematurely—that is, before the time arrives at which,

¹ 2 Min. Insts. 87.

² 2 Min. Insts. 87; 2 Bl. Com. 109; 1 Th. Co. Lit. 507, note (36); 1 Preston, Est. 431.

³ Ante, § 157.

⁴ Post, § 479.

by the express terms of its original limitation, it should regularly terminate—and is created by such words as “if,” or “provided that, or “upon condition that,” etc.; while a special limitation is itself a part of the original limitation, marking out or describing the utmost period during which the estate may endure, that is, until the event happens which of itself terminates the estate. A special limitation is created by the use of such words as “until,” or “as long as,” or “while,” or “during,” etc. To this latter class belong fees qualified.⁵

Thus, a conveyance of land “to A. and his heirs, as long as they remain citizens of Virginia” is a fee qualified in A., which may last forever, but which may terminate at any time not only by the exhaustion of A.’s heirs, but by their ceasing to be citizens of Virginia. On the other hand, a conveyance “to A. and his heirs (in fee simple), but if they should cease to be citizens of Virginia, the estate to terminate,” creates a fee simple in A. upon a condition subsequent.

§ 159. Descendible Freeholds. There is a certain class of interests which (strictly speaking) ought not to be classed as fees qualified, because they cannot by possibility endure forever, but which nevertheless are freehold estates, and may endure for ages. Such is a conveyance “to A. and his heirs, as long as a certain tree (or building) shall stand.”

This would seem to be an intermediate estate between a life estate and a fee qualified, enduring longer than a life and descendible to the heirs, but yet not a base fee, because not capable in the nature of things of lasting forever.⁶

But it seems to be settled now that such an estate is to be regarded, in most respects at least, as if it were a base or qualified fee, and not as creating a distinct class of estates of inheritance.⁷

As will appear in the following section, there is one respect at least in which it differs from a fee qualified.

§ 160. Quasi Reversion in Grantor after a Fee Qualified. In the case of a grant of the fee-simple absolute, there can be no reversion left in the grantor, for the fee simple, which is the entire estate, has departed from him unconditionally.

But if the fee simple be given upon a condition subsequent, there is a possibility, if not a probability, that the estate will once

⁵ Post, § 479.

⁶ 2 Min. Insts. 87, 88.

⁷ 2 Min. Insts. 88; 1 Washburn, Real Prop. 94; 4 Kent, Com. 49. Plowden and Preston call it a “determinable fee.” Walsingham’s Case, 2 Plowd. 557; 1 Preston, Est. 432, 441. Lord Coke, more logically, calls it a “descendible freehold.” Seymour’s Case, 10 Co. 98a.

more return to the grantor upon the breach of the condition, or the failure to comply therewith. This possibility is not a reversion, however, but a mere contingent "possibility of reverter," or "quasi reversion," and is not regarded at common law as an interest in land at all.

So it is, also, in the case of fees qualified. Since the fee qualified may endure forever, nothing is left in the grantor at common law save a "possibility of reverter," or a "quasi reversion," which may become an interest in the future by the arrival of one of the regular periods of expiration marked out for the estate in its original limitation. Such was the remarkable instance mentioned by Lord Hale of the grant by Henry III of the manor of Penrith and Sourby "to Alexander, King of Scotland, and his heirs, Kings of Scotland." Alexander, having daughters, one of whom married the Earl of Hunt, died leaving no heir who was King of Scotland; whereupon it was adjudged that the estate was determined, and that the manor reverted to the heir of Henry III, who was Edward I, and he recovered it accordingly.⁸

But if the interest is a "descendible freehold"⁹—an estate that cannot last forever—a true reversion, it is said, remains in the grantor.¹⁰

§ 161. Incidents of the Fee Qualified. The owner of the fee qualified, as long as the estate continues and the possession remains in him or his heirs, enjoys the same rights in respect to it which he would have if he were tenant of the fee simple. Hence all the incidents of the fee-simple estate attach also to the fee qualified, and no further reference to them need here be made.¹¹

⁸ 2 Min. Insts. 87.

⁹ Ante, § 159.

¹⁰ 1 Washburn, Real Prop. 95.

¹¹ 2 Min. Insts. 88; 1 Washburn, Real Prop. 95; ante, § 150 et seq.

CHAPTER IX.

THE FEE CONDITIONAL.

- § 162. Nature of the Fee Conditional at Common Law.
163. Fee Conditional Converted into Fee Simple by Birth of Issue.
164. Objections on Part of Nobility to Fee Conditional.
165. Fee Conditional Converted into Fee Tail by Statute "De Donis Conditionalibus."

§ 162. Nature of the Fee Conditional at Common Law. At common law, the term appropriate to the creation of a fee conditional was the phrase "heirs of the body." A conveyance "to B. and the heirs of his body" created a fee conditional at common law.

The reader must observe that the fee conditional estate is to be carefully distinguished from a fee simple upon condition, in that it is not every condition that constitutes a fee conditional. For the fee conditional there is but one condition, namely, that the grantee shall have heirs of the body.¹

§ 163. Fee Conditional Converted into Fee Simple by Birth of Issue. The birth of issue being a fulfillment of the condition, the estate upon general principles ought to become immediately absolute for all purposes whatsoever. But the doctrine of the common law was that the fee conditional thereby became an absolute fee simple, for three purposes only, namely; (1) To aliene in fee simple; (2) to charge with rents, commons and other incumbrances; and (3) to forfeit for treason. If, however, none of these things happened before the issue died, the estate lost its character of fee simple, and became once more a fee conditional, as before; and if the grantee should finally die without issue the land reverted to the grantor, whilst if he should die leaving issue (none of the three things above mentioned having happened) the land descended to such issue as a fee conditional.²

Under this state of the law, the grantee of a fee conditional, as soon as he had fulfilled the condition by having issue, would generally hasten to convey the land in fee simple to some friend,

¹ 2 Min. Insts. 88; 2 Bl. Com. 110; 1 Preston, Est. 477. A conveyance to one "and the heirs of his body" was thus at common law in effect equivalent "to one and his heirs, if he should have heirs of the body." 1 Tiffany, Real Prop. § 22.

² 2 Min. Insts. 88; 1 Th. Co. Lit. 508, 509; 2 Bl. Com. 111, note (17); 1 Washburn, Real Prop. 98.

taking back from him immediately a fee simple in lieu of the fee conditional before owned by him, thus frustrating the family objects of the limitation and defeating the possibility of reverter previously existing in the donor.³

§ 164. **Objections on Part of the Nobility to Fee Conditional.** The nobility objected especially to the power of alienation in fee simple enjoyed by the donee of the fee conditional, upon birth of issue, and to the liability of the estate thereupon to be forfeited for treason. These attributes of the fee conditional did indeed affect their order injuriously in three ways. In the first place, the nobles were for the most part the donors of these estates, and by according to the donee the power to aliene in fee simple the possibility of reverter was practically destroyed. In the second place, when an improvident noble was the donee, he was thus empowered to aliene the family estates to the detriment of the aggregate power and influence of the order. And in the third place, the nobles being the main participants or victims in the frequent real or pretended treasons of the feudal period, the forfeiture of these estates for treason redounded for the most part to their disadvantage.⁴

§ 165. **Fee Conditional Converted into Fee Tail by Statute "De Donis Conditionalibus."** In consequence of the objections above enumerated, the nobility (who then constituted practically the whole Legislature), under the plausible pretext of giving full effect to the will of the donor, proposed and carried the famous statute of Westminster II, 13 Edw. I, c. 1, usually called the "statute de donis conditionalibus" (concerning fees conditional), which, in respect to lands and tenements, converted fees conditional into fees tail.⁵

The effect of this statute was to destroy the power of alienation in fee simple and of charging the estate with incumbrances, after the birth of issue, and to relieve the estate from liability to forfeiture for treason. Thenceforth the estate remained in effect a perpetual fee conditional, though called an estate tail.⁶

The courts construed the statute de donis to create three distinct estates, upon a conveyance by G. "to A. and the heirs of his body": One estate (of inheritance) in A., the donee; another in the heirs of A.'s body, of which A. could by no means deprive them; and a

³ 2 Min. Insts. 88; 2 Bl. Com. 111.

⁴ 2 Min. Insts. 89; 2 Bl. Com. 111, 112.

⁵ 2 Min. Insts. 89; 2 Bl. Com. 111, 112, 113, note (18); 1 Th. Co. Lit. 213, 219, 514; 3 Th. Co. Lit. 105, 106, note (10).

⁶ 2 Min. Insts. 89.

third, by way of reversion (not merely a "possibility of reverter"), upon a failure of the heirs of A.'s body, in the donor or his heirs.⁷

The estate thus created by way of reversion in the donor or his heirs was a vested, and not a contingent, estate, for all true reversions are vested; ⁸ the estate tail, unlike the fee conditional and fee qualified, being regarded as distinctly a lesser estate than the fee simple, and an estate which in the eye of the law could not last forever.

⁷ 1 Washburn, Real Prop. 100, 101.

⁸ Post, § 672.

CHAPTER X.

THE FEE TAIL.

- § 166. Origin of Estates Tail.
- 167. Things Which May Be Entailed.
- 168. Estates Tail General and Special—Male and Female.
- 169. Words of Inheritance Necessary in Common-Law Conveyances to Create an Estate Tail.
- 170. Words of Inheritance Necessary in a Devise to Create an Estate Tail.
- 171. Estates Tail Created by Implication in Devises.
- 172. Rule in Wild's Case.
- 173. Estates Otherwise Fees Simple Reduced to Fees Tail by Implication.
- 174. Mischiefs of Estates Tail.
- 175. Difficulties in the Way of Remedying These Mischiefs.
- 176. First Method of Barring or Conveying Entails—Taltarum's Case.
- 177. Later Assaults upon Entails in England.
- 178. Existing State of Entails in England.
- 179. Incidents of Estates Tail.
- 180. Estate Tail after Possibility of Issue Extinct.
- 181. The Fee Tail in the United States Generally

§ 166. **Origin of Estates Tail.** The fee tail originated, as shown in the preceding section, in the statute *de donis conditionalibus*, 13 Edw. I, c. 1 (A. D. 1285), which converted the fee conditional into the estate tail. This statute provided in substance that the will of the donor, according to the form of expression in the deed of gift (*per formam doni*) should be observed, so that he, to whom any tenement was given on such condition as formerly would create a fee conditional, should have no power to aliene the same, but that it should remain to his issue after his death, or if there were no issue should revert to the donor or his heirs.¹

The name fee tail (*feudum talliatum*) was borrowed from the feudists, amongst whom it signified any mutilated or truncated inheritance from which the heirs general were cut off; or, as some say, because ownership of the subject was cut into two parts, one going to the donee and the heirs of his body and the other remaining as a reversion in the donor.²

§ 167. **Things Which May Be Entailed.** The word employed in the statute *de donis* is "tenement," which denotes any corporate inheritance capable of being holden of a feudal superior, and also includes all inheritances issuing out of, annexed to, or exercisable within, the same, for example, not only lands, but likewise rents

¹ 2 Min. Insts. 89; 2 Bl. Com. 112; 1 Th. Co. Lit. 512 et seq.

² 2 Min. Insts. 89; 2 Bl. Com. 112, note (m); 1 Th. Co. Lit. 512, 525, 526.

of all kinds, commons, dignities, uses, and other profits granted out of lands or which concern certain places, all of which may be entailed under the statute.

But mere personal chattels are not entailable, and, if given to one "and the heirs of his body," the absolute estate therein passes to the grantee. Neither is an annuity nor a corody entailable, for, though incorporeal hereditaments, they are not tenements; but these latter, if limited to the grantee "and the heirs of his body," remain as at common law fees conditional.³

§ 168. Estates Tail General and Special—Male and Female. The will of the donor was made so supreme by the statute de donis that not only might he limit the inheritance to the special heirs of the donee's body, but he was permitted to prescribe both the parents, and even the sex, of the heirs; a permission peremptorily denied in the case of a fee simple, so that a limitation to a grantee and his heirs male is simply surplusage with respect to the word "male," and amounts merely to an ordinary fee simple descendible to the heirs general, regardless of sex.⁴

If only one parent is named, as in the case of a conveyance "to A. and the heirs of his body," the estate is a fee tail general, and this in turn may be an estate tail male general or an estate tail female general, according as the sex of the heirs of A.'s body is designated in the original limitation.⁵

If both parents are named, as in the case of a conveyance "to A. and the heirs of his body upon his present wife, M., begotten," the estate is a fee tail special, which will be an estate tail male special or an estate tail female special according as the sex of the heirs is designated. If the sex of the heirs of A.'s body is not mentioned at all, the estate created is simply an estate tail special or general, as the case may be.⁶

If the sex of the heirs be designated, as upon a conveyance "to A. and the heirs female of his body," all future heirs of the estate must not only themselves answer the description of sex contained in the gift, but can claim only through persons who answer that description. Thus, in the case just mentioned, if A. only has a son, who himself only has a daughter, the latter cannot succeed to the estate tail (though her father be dead at the time of A.'s death) for she claims through a male.⁷

³ Ante, § 62; 2 Min. Insts. 89, 90; 2 Bl. Com. 113, note (18); 1 Th. Co. Lit. 213, 219, 514; 3 Th. Co. Lit. 105, 106, note (10).

⁴ 2 Min. Insts. 90; 2 Bl. Com. 113 et seq.; 1 Th. Co. Lit. 547; ante, § 152.

⁵ 2 Min. Insts. 90, 91; 2 Bl. Com. 113, 114; 1 Th. Co. Lit. 530, 541, 551.

⁶ 2 Min. Insts. 90, 91; 2 Bl. Com. 113 et seq.; 1 Th. Co. Lit. 530, 541, 551.

⁷ 1 Washburn, Real Prop. 109.

§ 169. Words of Inheritance Necessary in Common Law Conveyances to Create an Estate Tail. At common law, in the creation of estates tail as of other estates of inheritance, the word "heirs" was indispensable (qualified in the case of the fee tail by other words, such as "of the body," showing from whom the heirs are to spring). But no particular words of procreation are requisite; that is, words showing of whose body the issue is to be begotten. It is enough if it appears with reasonable certainty from whom the issue is to spring.⁸

Thus, a conveyance "to A. and his heirs, namely, the heirs of his body," or "to A. and his heirs, of himself lawfully issuing or begotten," or "of his wife begotten," all these suffice to create an estate tail.⁹

But, as in other instances of inheritances created at common law by deed, no synonym nor circumlocution can in general supply the place of the word "heirs." Without that word, the conveyance will usually create a life estate only, though other words be used having the same meaning as "heirs of the body." Thus, a conveyance "to A. and the issue of his body," or "to A. and his lineal descendants," or "to A. and his seed," or "to A. and his offspring," will only at common law create a life estate in A., if used in a deed.¹⁰

§ 170. Words of Inheritance Necessary in a Devise to Create an Estate Tail. In the creation of an estate tail by devise, as in the creation of a fee simple by the same means,¹¹ the intention of the testator is looked to rather than any technical form of words. Hence, if that intention be clearly expressed or necessarily implied to create an estate tail, such will be the effect, though the formal words of inheritance be absent.¹²

Thus, a devise "to A. and his issue" (or "descendants," or "seed," or "offspring") would create an estate tail in A., though if it were a deed a mere estate for the grantee's life would arise.¹³

§ 171. Same—Estates Tail Created by Implication in Devises. The testator's intention may be shown by necessary implication, as well as by the express language of the will, so that the essential words of inheritance, though entirely absent, may often be implied, if the testator's manifest intention makes it necessary; or

⁸ 2 Min. Insts. 91; 2 Bl. Com. 114, 115; 1 Th. Co. Lit. 520, 521.

⁹ 2 Preston, Est. 485; 1 Washburn, Real Prop. 110.

¹⁰ 2 Preston, Est. 480; 1 Washburn, Real Prop. 110.

¹¹ Ante, § 143.

¹² 2 Min. Insts. 91.

¹³ 2 Min. Insts. 91; 2 Bl. Com. 114, 115; Doe v. Collis, 4 T. R. 299; Knight v. Ellis, 2 Bro. Ch. 578.

words used in the will that would not ordinarily be construed as words of limitation, e. g. "children," may be so interpreted when it becomes necessary in order to carry out the testator's intention.

Thus, upon a devise "to A. for life, and if he die without issue to B. and his heirs," it is apparent that the testator intends that, should A. die leaving issue, the estate upon A.'s death should go to such issue. Hence there would at common law be implied in such a devise after A.'s life estate the words "remainder to A.'s issue," causing the devise to read by implication as follows: "To A. for life, remainder to A.'s issue, and if he die without issue to B. and his heirs."¹⁴ This would at common law create an estate tail in A. by force of the rule in *Shelley's Case*, as will be hereafter fully explained.¹⁵

So, if there be a devise to an unborn person for life, with remainder in tail either to his child or to his children, successively or in common, it is the manifest intention of the testator that the child or children should take an estate in the land. But under the rules of the common law a remainder to the child, children or issue of an unborn person is void. In order, therefore, to effectuate the general intent of the testator to give the child or children an estate, it is necessary to imply an estate tail in the unborn person instead of the life estate expressly given him by the will.¹⁶

So, too, in case of a devise "to A. for life, remainder to his children," where there is a manifest intent that the children should take an inheritance, which they could not do directly for want of words of inheritance, it has been held that A. takes an estate tail by implication, in order to effectuate the general intent; the word "children" being construed as equivalent to "issue," thus giving ground for the operation of the rule in *Shelley's Case*.¹⁷

¹⁴ *Pells v. Brown*, 3 Cro. Jac. 590; *Anon.* 3 Dyer, 354a; *Sonday's Case*, 9 Co. 128 a, note (B); *Attorney General v. Sutton*, 1 P. Wms. 757; *Doe v. Applin*, 4 T. R. 87; *Jiggetts v. Davis*, 1 Leigh (Va.) 368, 418; *See v. Craigen*, 8 Leigh (Va.) 449; *Tinsley v. Jones*, 13 Grat. (Va.) 289; *Wine v. Markwood*, 31 Grat. (Va.) 50, 51; *Tate v. Tally*, 3 Call (Va.) 354; *Bells v. Gillespie*, 5 Rand. (Va.) 273.

¹⁵ Post, § 610 et seq. But the rule in *Shelley's Case* is now abolished in several of the states.

¹⁶ *Gray*, Perpet. § 643 et seq.; 1 *Jarman*, Wills, 263; *Fearne*, Rem. 204, *Butler's note*; *Humbertson v. Humbertson*, 1 P. Wms. 332; *Parfitt v. Hemmer*, L. R. 4 Eq. 443; *Hampton v. Holman*, 5 Ch. Div. 183; *Jackson v. Brown*, 13 Wend. (N. Y.) 437. For the rule making void such remainders, see post, § 646.

¹⁷ 2 Min. Insts. 465; *Smith v. Chapman*, 1 Hen. & M. (Va.) 240, 299, 302; *Taylor v. Cleary*, 29 Grat. (Va.) 448.

§ 172. **Same—Rule in Wild's Case.** Another prominent instance of an estate tail by implication in a devise arises under what is known as the rule in Wild's Case.¹⁸

This rule is that in case of a devise "to A. and his children and their heirs," or simply "to A. and his children," if A. has no children at the time of the devise, a fee tail is vested in A., because the intention of the testator to give the children an estate can only be effectuated by supposing that he used the word "children" in the sense of "issue" or "heirs of the body," and so, in order to accomplish the intent, A. would take an estate tail by implication, such as is allowed in wills, but not in deeds.¹⁹

On the other hand, if the same limitation were found in a deed of feoffment or other conveyance inter vivos under the same circumstances, the whole fee simple or a life estate (according to the presence or absence of the word "heirs") would vest in A., not to be divested even partially by the subsequent birth of children; for the conveyance, being intended to operate in *præsenti*, would pass nothing to the nonexistent children (though born later), and it cannot be construed as creating a remainder to the children, because that is not consistent with the intent.²⁰

In construing the terms of the rule in Wild's Case, the meaning of the phrase "at the time of the devise" is not entirely settled. It seems, however, to be the better opinion that we are not to understand thereby the date of execution of the will, but the date when it is to take effect, whether that be the death of the testator or a time subsequent thereto.²¹

If there are children living at the time of such a devise (and in this case, the principle extends to conveyances also), they will take, if a contrary intention does not appear, as purchasers under the devise or conveyance, a joint estate with the parent—at com-

¹⁸ Wild's Case, 6 Co. 17 a and b.

¹⁹ 2 Min. Insts. 84, 85; 1 Th. Co. Lit. 496; Wild's Case, 6 Co. 17 a and b; Stevens v. Lawton, 1 Cro. Eliz. 121; Frederick v. Frederick, 1 Cro. Eliz. 334; Crone v. Odell, 1 Ball & Beat. 459; Oates v. Jackson, 2 Str. 1172; Doe ex dem. Thomason v. Andersons, 4 Leigh (Va.) 122; Moon v. Stone, 19 Grat. (Va.) 130, 328.

²⁰ 2 Min. Insts. 84, 85, and other authorities cited *supra*.

²¹ 2 Min. Insts. 85; 2 Jarman, Wills, 75, 307, 312; Buffar v. Bradford, 2 Atk. 220; Gilmore v. Severn, 1 Bro. Ch. 582; Prescott v. Long, 2 Ves. Jr. 690; Barrington v. Tristram, 6 Ves. 345; Crone v. Odell, 1 Ball & Beat. 459; Hamlett v. Hamlett, 12 Leigh (Va.) 350, 357, 369; Brent v. Washington, 18 Grat. (Va.) 528.

mon law, a joint fee simple or a joint life estate according as the word "heirs" is or is not used.²²

§ 173. Same—Estates Otherwise Fees Simple Reduced to Fees Tail by Implication. Not only may estates, otherwise life estates, be raised by implication to the dignity of fees tail, as pointed out in the preceding sections, but the process may be reversed, and estates, otherwise fees simple by virtue of the employment of the word "heirs," etc., may in a devise be cut down to fees tail by the use of qualifying words showing an intent to employ the word "heirs" in the sense of "heirs of the body" or "issue."

Thus, a devise "to A. and his heirs, if he should have lawful issue, but if he die without issue then over," etc., creates an estate tail in A. by implication; it being evident that the testator uses the word "heirs" as equivalent to "heirs of the body" or "issue."²³

§ 174. Mischiefs of Estates Tail. The statute *de donis*, in thus creating estates tail and tying them up in families ("a family law" it has been well called), proceeded upon the insidious suggestion that a man ought to be permitted to do what he will with his own property; whereas, the idea of property being deduced from the general welfare, it is a perversion and abuse to allow it to be used in such a way as to injure the community. It is remarkable that so astute a prince as Edward I, not improperly styled "the English Justinian," did not anticipate the mischief likely to ensue as well to the crown as to the body of society, and refuse to sanction an enactment conceived exclusively in the interests of the nobility. It may be conjectured that some motive not traceable in history influenced him to consent to what his judgment could hardly have approved.²⁴

Indeed, the mischiefs resulting to society at large from the establishment of estates tail were many and very soon patent to all. Since the issue took a distinct estate, of which they could be deprived by no act (voluntary or involuntary) of the tenant in tail, some of the most important and harmful consequences ensued. Thus, (1) children were rendered insubordinate, because they knew they could not be disinherited, even partially; (2) lessees of the tenant in tail were ousted of their leases by the tenant's death, the lands thereupon going to the issue *per formam doni*;

²² See 2 Min. Insts. 84; *Wild's Case*, 6 Co. 17 a and b; *Cook v. Cook*, 2 Vern. 545; *Buffar v. Bradford*, 2 Atk. 221; *Wilson v. Maddison*, 2 Yo. & Coll. 81; *Pyne v. Franklin*, 5 Sim. 458; *De Witte v. De Witte*, 11 Sim. 41; *Paine v. Wagner*, 12 Sim. 188; *Fitzpatrick v. Fitzpatrick*, 100 Va. 553, 42 S. E. 306, 93 Am. St. Rep. 976.

²³ 1 Washburn, Real Prop. 110; *Arnold v. Brown*, 7 R. I. 188.

²⁴ 2 Min. Insts. 91, 92; 1 Th. Co. Lit. 510 et seq.

(3) creditors of the tenant in tail, having advanced money or goods on the faith of the land, were defrauded of their debts, since to charge the entailed estate for a longer period than the tenant's own life would be to deprive the issue of their interest; (4) public prosperity was checked by the inalienability of the land entailed; and (5) treasons were encouraged, since the entailed estates were not forfeitable for treason except during the life of the tenant, and the nobility, holding most of their lands in this way, cared less for their personal safety than for the security and aggrandizement of their families.²⁵

Of all these mischievous consequences of the law of entails the most important and far-reaching was that the lands were rendered inalienable. Experience has demonstrated that the prosperity of a community depends much upon the freedom with which property may be transferred from hand to hand. Any obstructions to such transfer are therefore hindrances to the general well-being. To make any considerable proportion of the property of a country by law inalienable, whether under the pretext of conforming to the will of him who granted it or of securing a support for families, will be found to exert a demoralizing influence upon society, to paralyze its energies, and to destroy its thrift.²⁶

§ 175. Difficulties in the Way of Remedying These Mischiefs. The mischiefs attending the law of entails, described in the preceding section, were early acknowledged, but it was difficult to devise an available remedy. The statute, too, had been drawn with such consummate skill and foresight, and the enactment so completely covered and prohibited the conveyance of the estate tail by any form of conveyance at that time discovered, that, despite the wishes of the judges and of the people, no opening was found to evade its restrictions for nearly two hundred years; that is, until 12 Edw. IV (A. D. 1473).²⁷

§ 176. First Method of Barring or Conveying Entails—Taltarum's Case. In 12 Edw. IV (A. D. 1473) it was decided by the judges in Taltarum's Case that the claim of the issue, as well as the reversion in the donor, might be barred by means of a common recovery suffered by the donee in tail.²⁸

²⁵ 2 Min. Insts. 92; 2 Bl. Com. 116.

²⁶ 2 Min. Insts. 92. The transfer of an estate tail at common law by a "tortious conveyance"—that is, a feoffment or fine—worked a discontinuance of the entail and a forfeiture in favor of the reversioner or remainderman. It was otherwise if the conveyance were an "innocent" one. See post, § 194.

²⁷ 2 Min. Insts. 93; 2 Bl. Com. 116, 117.

²⁸ 2 Min. Insts. 93; 2 Bl. Com. 117; Taltarum's Case, Year Book 12 Edw. IV, pl. 25, f. 19; Digby, Hist. Real Prop. 250 et seq.; Challis, Real Prop. 244.

A "common recovery" is a collusive suit instituted by the intended grantee of land against the proposed grantor, ostensibly to recover by title paramount the land proposed to be conveyed, in which by collusion and agreement of the parties a judgment is given by default to the grantee under a pretended paramount claim.²⁹

§ 177. **Later Assaults upon Entails in England.** The armor of these "coarcted inheritances" (as an old writer quaintly styles them) having been thus once pierced by Taltarum's Case, attacks were soon made upon them in other directions, some of which it would scarcely be profitable at this day to mention.³⁰

By the statute 26 Hen. VIII, c. 14, all estates of inheritance (under which words estates tail were covertly included) are declared forfeitable for treason. And by the statute, 32 Hen. VIII, c. 36, a fine duly levied by the tenant in tail was declared to be a complete bar to the fee tail, as to all persons claiming under it; thus repealing pro tanto the statute de donis, which had expressly prohibited the use of a fine to bar the entail.³¹

Finally, by 3 and 4 Wm. IV, c. 74 (A. D. 1833), fines and common recoveries are abolished, and estates tail are permitted to be conveyed by a mere deed enrolled in the court of chancery, but not by will.³²

§ 178. **Existing State of Entails in England.** Since 3 and 4 Wm. IV, c. 74 (A. D. 1833), estates tail have been made much more easily and cheaply barrable in England than formerly, all that is necessary being a simple deed executed by the tenant in tail and enrolled in chancery; but they cannot under this statute be barred by will.³³

²⁹ 2 Min. Insts. 93; 2 Bl. Com. 117, 357 et seq.; 1 Washburn, Real Prop. 102, 103. A somewhat similar mode of conveyance at common law was a fine, which differed from a common recovery in that the land went to the pretended claimant (the proposed purchaser)—not by default—but by a compromise of the claim, upon which the court would render a judgment in favor of the purchaser for so much of the land to be conveyed as was embraced by the compromise. 1 Washburn, Real Prop. 102.

Fines originated at a much earlier period than common recoveries, and were in use at the time the statute de donis was enacted, so that the statute took pains expressly to prohibit the conveyance of estates tail by fine. Recoveries, being introduced at a later period, were not mentioned in the statute de donis, and therefore could be legitimately admitted by the courts as a means of barring the entail.

³⁰ See 2 Min. Insts. 94.

³¹ 2 Min. Insts. 94; 2 Bl. Com. 118, 348, et seq.

³² 2 Min. Insts. 94; Williams, Real Prop. 46, 49, et seq.

³³ 2 Min. Insts. 95; Williams, Real Prop. 49 et seq.

Since estates tail have become so easily barrable, lands can now in England be kept entailed only by frequent resettlements on successive generations by means of marriage settlements, which have consequently become very common there.³⁴

These settlements are usually in the form of a conveyance "to the husband and wife for their lives, remainder to the survivor for life, remainder to the first and other sons of the marriage in tail, remainder to the daughters of the marriage in tail, remainder to the right heirs of the grantor" (usually the husband).³⁵ It will be observed (for future reference) that the longest period during which this land can be kept inalienable (by common recovery or under 3 and 4 Wm. IV, c. 74, above alluded to) is until the first son of the marriage becomes twenty-one. Immediately thereupon he may convey his estate tail by common recovery or (in later times) by deed enrolled in chancery.³⁶

§ 179. Incidents of Estates Tail. The most prominent incidents of the fee tail, as it now exists in England are the following:

1. Tenant in Tail Not Liable for Waste.—Waste is defined to be "a permanent injury to the inheritance arising otherwise than by an act of God or a public enemy."³⁷ Waste, therefore, can never be alleged of one who owns an estate of inheritance, as does a tenant in tail.³⁸

2. Estate Tail Subject to Curtesy and Dower.—This also arises from the fact that an estate tail is an estate of inheritance, in all of which estates possessed during the coverture the consort has dower or curtesy.³⁹

3. Estates Tail Barrable.—This was not originally an incident of the fee tail, but, being first allowed in *Taltarum's Case* by means of common recoveries, has of later years been permitted quite freely by deed enrolled in chancery, though not by will.⁴⁰

4. Estate Tail Not Subject to Merger.—It is a general rule of the law, presently to be discussed,⁴¹ that when a smaller and a larger estate come into the same hands, the larger merges the smaller, and the latter is totally extinguished. But this rule does not apply if the smaller estate is a fee tail, which is not merged

³⁴ 1 Washburn, Real Prop. 104.

³⁵ 2 Min. Insts. 272; 2 Bl. Com. 174, note (21); *Long v. Blackall*, 7 T. R. 101.

³⁶ See post, § 700.

³⁷ Post, § 379.

³⁸ 2 Min. Insts. 94, 95; 2 Bl. Com. 115, 116; 1 Washburn, Real Prop. 112.

³⁹ 2 Min. Insts. 95; 2 Bl. Com. 116. See post, §§ 208, 220, 237.

⁴⁰ Ante, §§ 177, 178; 2 Min. Insts. 95.

⁴¹ Post, § 665 et seq.

in the fee simple, though both be in the same hands. On the contrary, the fee tail remains a distinct estate, as before, descendible to the issue only and (originally at least) inalienable from them (now alienable by deed enrolled).⁴²

5. Estate Tail Forfeitable for Treason.—This incident, not originally belonging to the fee tail, attaches thereto by virtue of the statute 26 Hen. VIII, c. 13.⁴³

§ 180. Estate Tail after Possibility of Issue Extinct. This is in reality a life estate created by act of the law. It arises out of estates tail special only, as where land is given "to A. and the heirs of his body of his present wife, M., begotten," and M. dies without issue. There is now a complete extinction of all possibility of issue to succeed to the property, and A.'s new interest is described, by a long, but needful, periphrasis, as an "estate tail after possibility of issue extinct." After the death of M. without issue, A. is in truth no more than a tenant for life, but with some of the privileges of a tenant in tail, as he previously was. Thus, for example, he is dispunishable for waste, out of regard to the inheritance of which he was lately seised.⁴⁴

§ 181. The Fee Tail in the United States Generally. Very generally in the United States the fee tail has been abolished, or converted into some other form of estate, by statute, upon the theory that family estates of this kind are not in the main conducive to the welfare of a republic.

In many of the states the fee tail has been converted into an estate for life, with remainder in fee simple to the issue; in others the estate tail has been converted outright into the fee simple. In only two or three (of which Delaware and Maryland are instances) is the estate tail retained, and even in those states the tenant in tail may convey in fee simple. In South Carolina the peculiar doctrine is held that the statute *de donis* was never in effect there; the ancient fee conditional of the common law being created upon a conveyance to one "and the heirs of his body."⁴⁵

⁴² 2 Min. Insts. 95; 1 Washburn, Real Prop. 113.

⁴³ Ante, § 177; 2 Min. Insts. 94, 95.

⁴⁴ 2 Min. Insts. 114; 2 Bl. Com. 124, 125, note (6).

⁴⁵ See 1 Washburn, Real Prop. 117, note, where the laws of the various states touching the fee tail are collected.

CHAPTER XI.

LIFE ESTATES IN GENERAL.

- § 182. General Nature of Life Estates.
- 183. Life Estates by Act of the Law.
- 184. Life Estates by Act of the Parties—Express or Implied.
- 185. Life Estates Created by Transfer, Reservation or Exception.
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- 187. 2. Estate Pur Auter Vie.
- 188. Common and Special Occupancy Incident to Estates Pur Auter Vie.
- 189. Doctrine as to General and Special Occupancy.
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- 192. I. Life Tenant's Right to Emblements.
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- 199. V. Life Tenant's Liability for Waste.
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- 202. VIII. Life Tenant's Duties and Rights as to Repairs and Improvements.
- 203. IX. Life Tenant's Duty to Keep Down Interest and to Pay Incumbrances.
- 204. Same—Mode of Ascertaining Present Value of a Life Estate.
- 205. X. Life Tenant's Duty to Pay Taxes and Local Assessments.
- 206. XI. Life Tenant's Duty to Defend the Title, if Attacked.
- 207. XII. Apportionment of Rent upon Life Tenant's Death, in Case of a Sublease.

§ 182. **General Nature of Life Estates.** Life estates, being estates of indeterminate duration, are freehold estates, and must therefore pass at common law by livery of seisin, but yet are not estates of inheritance, since they terminate upon the death of the tenant or of another living person. They are classified, as has already been shown,¹ as follows:

- I. Estates for Life by Act of the Parties.
 - 1. Estates for the Tenant's Own Life.
 - 2. Estates for the Life of Another (Pur Auter Vie).
 - 3. Estates Which May Last for Life, but are Terminable Sooner by a Contingency.
- II. Estates by Act of the Law.
 - 1. Estate Tail after Possibility of Issue Extinct.
 - 2. Estate by the Curtesy.
 - 3. Estate in Dower.

¹ Ante, § 137.

§ 183. **Life Estates by Act of the Law.** When created by act of the law itself, no livery of seisin is necessary even at common law, for that implies an act of the parties; but the law itself vests the estate in the tenant, without the necessity for a deed or act on the part of the latter.

§ 184. **Life Estates by Act of the Parties—Express or Implied.** A life estate arises by act of the parties, when it is the result of some agreement or transfer, to be accompanied always at common law by livery of seisin or (in the case of incorporeal hereditaments which did not lie in livery) by grant.² Hence it follows that life estates created at common law by act of the parties, at least as to corporeal property, must always be express, and could never be implied without words of grant. But though the intent be to create an estate of inheritance, if the words of grant are not sufficient for that purpose, and yet there is a conveyance to the grantee, he will at common law take a life estate, as in case of a grant "to A." (without words of limitation), or even "to A. in fee simple."³

In wills, however, which were introduced into the English law of real property at a much later stage, the intention of the testator was looked to rather than the presence or absence of any particular technical words; * and, since wills did away with the necessity for livery of seisin as to the lands devised, the courts had no difficulty in raising up life estates therein by mere implication, where the implication is a necessary one. Thus, a devise "to the testator's heir after the death of testator's wife" vests a life estate in the wife, though no interest be expressly given her. For since the testator's heir is to take only after the wife's death, and the testator has made no express provision for the disposition of the land in the meanwhile, he must have intended that it should go to the wife till her death. Indeed, there is no one else to whom it could go.⁵

But let it be observed that in construing a will conjecture must not be taken for certainty. The implication, which may thus abrogate the technical rules of the common law, must be not only a possible, but a necessary, implication, which means, however, not a natural necessity, but so strong a probability of intention that a contrary design would be absurd, and therefore cannot be imputed to the testator. Hence, in the example above supposed if the testator should give the land to a stranger after his wife's death, no life estate would be implied in the wife, for meanwhile until the wife's death there is the testator's heir to whom the land may go.⁶

² Ante, § 132.

³ Ante, §§ 139, 140.

⁴ Ante, § 143.

⁵ 2 Min. Insts. 1075; 2 Bl. Com. 381, note (23).

⁶ 2 Min. Insts. 1073; 2 Bl. Com. 381, 382, note (23), (25); 1 Th. Co. Lit.

§ 185. Life Estates Created by Transfer, Reservation or Exception. While life estates by act of the parties are usually created by grant or devise, it is not essential that they should be so created. They may arise also by reservation, and sometimes by exception.⁷

Thus, upon a lease of land for the tenant's life, a rent may be reserved to the lessor during the term. This would constitute in the lessor an estate in the rent for the life of the lessee (an estate *pur auter vie*).⁸

So one having a fee simple in land may convey the same to another in fee to commence after the grantor's death. The estate remaining in the grantor would be an estate for his life, not by grant, nor by reservation, but by exception.⁹

§ 186. 1. Estates for Tenant's Own Life. A devise or conveyance to one for his life will always pass to the grantee an estate for his life at least, and may pass even a fee simple, if the absolute power of disposition is conferred upon the life tenant.¹⁰

An estate thus limited for the tenant's life was liable at common law to be terminated by the civil, as well as the natural, death of the tenant. Hence conveyances and devises are often expressed to be "during the natural life" of the tenant. But in this country, no such distinction exists, there being with us no such thing as civil death. The word "natural," therefore, is now mere surplusage.¹¹

If an estate be conveyed "to A. for life," a doubt may arise whether this is intended to pass an estate for the life of the grantee or for the life of the grantor. The general rule of construction in such case is that the grant is to be construed most strongly against the grantor, to pass the greatest estate that can reasonably pass under the words chosen by the grantor in making his conveyance, provided such an interpretation of the ambiguous language works no wrong to third persons. Hence a conveyance such as that above mentioned usually passes an estate for the grantee's life, that being as to him more beneficial than an estate for any one else's life. But if the grantor himself had only an estate for his own life, it would be otherwise, and A. would be construed to take only an estate for the gran-

547, note (N); *Wilkinson v. Adam*, 1 Ves. & B. 466; *Coryton v. Helyar*, 2 Cox, 348.

⁷ The distinction between reservations and exceptions has already been pointed out. *Ante*, §§ 94, 144.

⁸ *Ante*, § 137.

⁹ 1 Washburn, Real Prop. 122.

¹⁰ *Ante*, § 151.

¹¹ 2 Min. Insts. 100; 2 Bl. Com. 121; 4 Bl. Com. 380; *Newsome v. Bowyer*, 1 Wms. 38; *Lean v. Schutz*, 2 Wm. Bl. 1198; *Carrol v. Blencow*, 4 Esp. 27; *Branch v. Bowman*, 2 Leigh (Va.) 170; *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118.

tor's life, for the latter cannot be presumed to have intended to work a wrong upon those entitled to the property after his death.¹²

§ 187. **2. Estate Pur Auter Vie.** An estate for the life of a person other than the grantee, being of indeterminate duration, is an estate of freehold. The tenant is styled a tenant pur auter vie, and the party during whose life the estate is to be held is denominated *cestui que vie*.¹³

§ 188. **Same—Common and Special Occupancy Incident to Estates Pur Auter Vie.** Upon a conveyance "to A. for the life of B.," should A. die before B., the common law found itself in a quandary as to the ownership of the estate. It could not go to A.'s heirs, because it is not an estate of inheritance; it could not go to his personal representative, because it is a freehold, and not a chattel interest; it could not return to the grantor, for that would be repugnant to the grant (which takes the estate out of the grantor until B.'s death); it could not escheat, for only the fee simple escheats. In this condition of things the common law was forced to fall back upon elemental principles, and to throw the property open to the occupancy of the first comer who should possess himself of it. This was called general or common occupancy.¹⁴

But if the grant were "to A. and his heirs during the life of B.," the case was somewhat altered at common law. True, it is still not an estate of inheritance (notwithstanding the word "heirs"), for it is granted only for B.'s life; but it is manifest that the grantor has here foreseen the contingency that A. might die before B., and has expressly provided for it by naming the heirs of A. as the persons to take upon his death in the lifetime of *cestui que vie*. Accordingly, the common law enforces that intention, and gives the land to A.'s heirs, who take, not indeed as heirs—that is, by descent (for it is not an estate of inheritance)—but as special occupants named by the grantor himself, thus obviating the mischievous and turbulent tendencies of common or general occupancy whenever the parties were prudent enough to insert such a limitation.¹⁵

¹² 2 Min. Insts. 98; 1 Th. Co. Lit. 620; 2 Bl. Com. 120; 1 Washburn, Real Prop. 121.

¹³ 2 Min. Insts. 98; 2 Bl. Com. 120. Perhaps the most usual instances of estates pur auter vie arise where a tenant for his own life assigns his interest to another, and where upon a lease for the tenant's own life, rent is reserved payable throughout the term. In the first instance the assignee is tenant of the land for the life of his assignor, and in the second the landlord is entitled to the rent during the life of the tenant.

¹⁴ 2 Min. Insts. 98, 99; 2 Bl. Com. 259; 1 Th. Co. Lit. 625, 626, note (II); 1 Washburn, Real Prop. 126.

¹⁵ 2 Min. Insts. 99; 2 Bl. Com. 259; 1 Th. Co. Lit. 326, note (I); 1 Washburn, Real Prop. 127.

The heirs in such case, however, do not take as purchasers, but as representing their ancestor (though not by descent).¹⁶ Hence the ancestor (the tenant *pur auter vie*) is at liberty to convey all the estate he has in the land, and if he afterwards die, living *cestui que vie*, his heirs, do not take as purchasers, but are bound by their ancestor's conveyance, the assignee holding the estate until the death of *cestui que vie*.¹⁷ But in order that the assignor's entire interest should thus pass, leaving nothing in his heirs, it seems that he himself must convey to his assignee "and his heirs." Otherwise, upon the death of the assignee, living *cestui que vie*, the heirs of the original tenant *pur auter vie* are entitled as special occupants. Thus, in *Doe v. Robinson*,¹⁸ an estate was limited to A. and his heirs during several lives. A. devised to J. (without words of limitation) and J. died before *cestui que vie*. It was held that the heirs of A., not the heirs of J., should take the remnant of the estate.

§ 189. Same—Doctrine as to General and Special Occupancy. In the United States, as well as in England, statutory provisions have come to the aid of the common law, and have abolished the absurd doctrine of general or common occupancy. Some of these statutes make the estate *pur auter vie* descendible, and others declare that it shall be treated and administered as a chattel interest.¹⁹

§ 190. 3. Estates Not Expressly for Life, but Which May Last for Life. Such estates do not include estates expressly for life, but liable to be prematurely defeated by the happening of a condition subsequent. Here, as in the case of a fee qualified and elsewhere, care must be taken to distinguish between an estate upon condition subsequent and an estate upon special limitation.²⁰

It is the latter class of estates we are now to consider. Thus, a conveyance "during coverture," or "until marriage," or "*durante viduitate*," or "as long as Z. resides abroad," creates an estate of this character.²¹ But a conveyance "to A. for life, but if he marries X. his estate to cease and determine," is an express life estate upon condition subsequent, and does not belong to the class of life estates we are now considering.

It must be noted, however, that to create a life estate of this class it is not enough that the estate may last during a life, or indeed that it must necessarily endure throughout a life. Thus, a term for one thousand years would embrace the lives of many generations, but it

¹⁶ 2 Min. Insts. 99.

¹⁷ See 1 Washburn, Real Prop. 127.

¹⁸ 8 B. & Cr. 296. See, also, *Allen v. Allen*, 2 Dr. & W. 307.

¹⁹ 1 Washburn, Real Prop. (6th Ed.) §§ 234, 235, where the various statutes are collated.

²⁰ See ante, § 158; post, § 479.

²¹ 2 Min. Insts. 100; 2 Bl. Com. 121.

is nevertheless not a life estate, but a term for years only.²² And the same may be said of a conveyance "to A. for one hundred years if he shall so long live." While such an estate is determinable by the death of A., if it happens before the expiration of the hundred years, the ultimate termination of the estate is a fixed and certain date, which constitutes it a leasehold, not a freehold, estate.²³

§ 191. Incidents of Life Estates in General—Enumeration. In case of life estates created by act of the law as well as those created by act of the parties, there are certain incidents which are annexed to the estate by the law itself, unless the parties, in case of the latter class of life estates, by stipulation deprive the estate of some of these incidents; or the parties may annex to such estates by express covenants, conditions or stipulations such incidents as they may see fit, not contrary to law.²⁴

§ 192. I. Life Tenant's Right to Emblements. The subject of emblements has already been fully discussed in another connection, and the student is advised at this point to turn to that discussion.²⁵ It suffices here to state that, since every life estate is in its very nature an estate which must terminate unexpectedly, emblements are allowed to the life tenant's personal representative, or, if the estate be *pur auter vie*, to the tenant himself; provided that the crops are sown by the tenant himself and that he has not terminated the estate by his own act.²⁶

The only exception to this general principle arises at common law in the case of a tenant in dower, whose personal representative was denied emblements, because the widow was presumed to have gotten the crops growing on her dower lands at the husband's death.²⁷ But by the English statute of Merton it is provided that emblements of dower lands shall pass and may be disposed of like those on any other lands held for life.²⁸

§ 193. II. Life Tenant's Right to Estovers. This subject, also, has been previously discussed, and to that discussion the student is now referred.²⁹ The right of the life tenant, as well as that of a tenant for years or at will, is fully established to cut as much wood, etc., on the premises as may be necessary to supply the needs of the land and buildings leased in the matter of fuel, of repairs, etc.³⁰

²² Ante, § 129.

²³ Ante, § 129; 2 Min. Insts. 191; 3 Bl. Com. 143; 1 Th. Co. Lit. 628, 632.

²⁴ 2 Min. Insts. 100; 2 Bl. Com. 122; 1 Th. Co. Lit. 624.

²⁵ Ante, § 41 et seq.

²⁶ 2 Min. Insts. 103, 105, et seq.; 1 Washburn, Real Prop. 134.

²⁷ Ante, § 44; 2 Min. Insts. 104; 1 Washburn, Real Prop. 134.

²⁸ 20 Hen. III, c. 2.

²⁹ Ante, § 39.

³⁰ 2 Min. Insts. 101; ante, § 39.

It is to be remembered, also, that this right is not to be enjoyed by the tenant in common with the owner, like a profit à prendre, but exclusive of him, at least in the absence of express stipulation, so that the landlord is a trespasser, and may be sued as such by the tenant, if he attempts to enter and cut down the trees, etc., during the continuance of the estate.³¹

§ 194. III. Life Tenant's Power to Aliene the Life Estate. In discussing the incidents of a fee-simple estate, it was pointed out that the power to aliene the fee can be restricted only by reasonable conditions as to persons and time.³²

But in the case of life estates it is otherwise, and according to the better opinion the life tenant may be absolutely restrained from all assignment of the estate during his tenancy—at least, where the restriction is imposed for the protection of the remainderman or reversioner.³³

In the absence, however, of conditions restraining the assignment of the interest, a life estate is as freely alienable as the fee simple,³⁴ though nothing more than an estate for the tenant's life can pass to the assignee, unless the life tenant's estate be coupled with a power to lease for a longer term, or for a term certain, or with a power to convey in fee, in which cases the life tenant's death would not necessarily terminate the assignee's estate.³⁵

§ 195. IV. Forfeiture of Life Estate for Certain Defaults of the Tenant. There are certain acts of a tenant for life or years which are so detrimental to the reversioner or remainderman that the law annexes to every such estate an implied condition that they shall not be done; and if the tenant does these acts his estate is thereby forfeited to the remainderman or reversioner, who may enter for the breach of the implied condition.³⁶

The acts of the tenant, which are thus grounds of forfeiture of his estate, are at common law: (1) The tenant's alienation by a "tortious" conveyance of a greater estate than he has; (2) his claim in a court of record of a greater estate than he is entitled to; and (3) his disclaimer in a court of record to hold of the landlord.³⁷

³¹ 2 Min. Insts. 101. See post, § 334.

³² Ante, § 151. See post, § 517 et seq.

³³ Post, § 525; 2 Min. Insts. 290, 291.

³⁴ 2 Min. Insts. 291; *Criswell v. Grumbling*, 107 Pa. 408; *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. 170.

³⁵ 2 Min. Insts. 770; 2 Th. Co. Lit. 433, note (C. 1); *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505; *McLendon v. Horton*, 95 Ga. 54, 22 S. E. 45.

³⁶ 2 Min. Insts. 263 et seq.; post, § 467.

³⁷ 2 Min. Insts. 111 et seq., 263 et seq.

§ 196. Same—1. "Tortious" Alienation by Tenant of Greater Estate than He Has. At common law the conveyances of feoffment with livery of seisin, fine, and common recovery were attended by a peculiar consequence. These conveyances were regarded as particularly solemn acts, so much so, indeed, that when executed by one in possession of land they were held at common law to import *prima facie* verity at least. Hence, if they purported to pass a fee simple (for example), they *prima facie* passed that estate, regardless of the real interest possessed by the grantor or his power of alienation. The *prima facie* title to such estate as appeared upon the face of these conveyances being thus vested in the grantee, if that estate were larger than the grantor possessed, his remainderman or reversioner would be compelled to abandon his right to enter upon the land peaceably at the termination of the grantor's estate, and must resort to an action at law to rebut the *prima facie* title vested by such conveyance in the grantee of the tenant. And, since the action at law was much more tedious and expensive than the simple entry after the termination of the tenant's estate, it was regarded as a grievous wrong done by the tenant to the reversioner or remainderman. Hence these particular conveyances were known at common law as "tortious conveyances," and by way of punishment therefor the tenant's estate was at once terminated (and with it his assignee's interest); the remainderman or reversioner acquiring the right to enter thereon at once, just as though the life tenant had died.³⁸

But in case of such forfeitures third persons who had already dealt with the life tenant in respect to his proper estate were saved harmless, and hence the remainderman or reversioner, upon such entry, was held to take the estate subject to any charges or incumbrances properly placed upon the estate by the life tenant; the land not being freed therefrom until the life tenant's death.³⁹ Thus if the life tenant, before making a tortious conveyance, had sublet the premises for ten years, though the remainderman or reversioner would succeed to the estate immediately upon the tortious conveyance, he could not oust the subtenant, but would be entitled to receive the rent from him. The tenant for life cannot by his own act defeat an interest which he himself has lawfully created.⁴⁰

The only conveyances deemed "tortious" at common law were the three above mentioned; that is, the feoffment, fine and recovery

³⁸ 2 Min. Insts. 111; 2 Bl. Com. 274; *Stump v. Findlay*, 2 Rawle (Pa.) 168, 19 Am. Dec. 632; *French v. Rollins*, 21 Me. 372; *Emerick v. Tavener*, 9 Grat. (Va.) 220, 225, 58 Am. Dec. 217.

³⁹ 2 Min. Insts. 267, 268.

⁴⁰ 2 Bl. Com. 275.

(none of which are now in practical use in the United States). No other conveyance would have the effect of forfeiture, because the remainderman or reversioner suffers no harm except where the conveyance is tortious. In other cases, even at common law, no greater estate could pass to the alienee than the tenant has the right to convey. Hence, if the conveyance were a conveyance under the statute of uses, though purporting to pass a fee simple, nothing would actually pass, even *prima facie*, save the tenant's own life estate.⁴¹

§ 197. **Same—2. Tenant's Claim in Court of Record of Greater Estate than He Owns.** This was a ground of forfeiture at common law, and, there being no statute abolishing it, it is believed to have the same effect at present in this country.⁴² Thus, if a tenant for life sues for an estate in fee simple, or any estate greater than his own, or so pleads in court as expressly or by implication to assert such greater estate to be in him, these are virtual disclaimers of tenure, punished by forfeiture of the life tenant's estate, or rather operating as a termination of the tenant's interest by his voluntary rejection of the title.⁴³

§ 198. **Same—3. Tenant's Disclaimer of Landlord's Tenure.** Such a disclaimer may take place in a court of record or in pais. If a tenant for life or for years neglects to render the lord the services or rent due, and upon an action brought to recover them disclaims in a court of record to hold of the lord, this would by the common law always induce a forfeiture of his estate, for reasons similar to those mentioned in the preceding sections, or rather it may be regarded as a voluntary and solemn denial by the tenant that he is entitled to his estate, which estops him from afterwards relying upon it, and makes him thenceforth a trespasser. This doctrine, it is believed, is as applicable in this country as at common law.⁴⁴

And if the disclaiming tenant was possessed of a term for years (but not in case of a freehold), it seems that the original common law would forfeit the tenant's estate for a disclaimer in pais as well

⁴¹ 2 Min. Insts. 111; 2 Th. Co. Lit. 207, 581, note (B); Gilbert, Uses, 102, 140; Seymour's Case, 10 Co. 96a; Emerick v. Tavener, 9 Grat. (Va.) 220, 225, 58 Am. Dec. 217; Pendleton v. Vandevier, 1 Wash. (Va.) 381; Stevens v. Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; Jackson v. Mancius, 2 Wend. (N. Y.) 357.

⁴² 2 Min. Insts. 112.

⁴³ 2 Min. Insts. 112; 2 Bl. Com. 276; 2 Th. Co. Lit. 208, note (E). But see 1 Washburn, Real Prop. 126.

⁴⁴ 2 Min. Insts. 112; 2 Bl. Com. 275; 2 Th. Co. Lit. 208, note (D); Willison v. Watkins, 3 Pet. 47, 48, 7 L. Ed. 596; Walden v. Bodley, 14 Pet. 156, 162, 10 L. Ed. 398; Merryman v. Bourne, 9 Wall. 592, 601, 19 L. Ed. 683; Emerick v. Tavener, 9 Grat. (Va.) 220, 58 Am. Dec. 217.

as in a court of record.⁴⁵ In modern times a life tenant's disclaimer in pais is as operative as that of a tenant for years. The doctrine is applicable at the present day to all tenants, whether the disclaimer be in a court of record or in pais,⁴⁶ and from that moment the tenant's possession becomes adverse to the landlord, provided the disclaimer be clear, positive and continued, and known to the landlord.⁴⁷

The same general principle applies in all cases in which the landlord seeks to enforce his rights against the tenant, for example, in an action to recover the arrears of rent. The tenant will not be permitted, in order to escape the liability imposed by the relation of landlord and tenant, to deny the landlord's title—that is, he is estopped to deny it—save in certain cases where the landlord's title has actually ceased before the right sought to be enforced has accrued, or where at that time it has been supplanted by the better title of another, etc. This principle of estoppel to deny the landlord's title will be discussed hereafter.⁴⁸

§ 199. V. Life Tenant's Liability for Waste. Waste is any permanent injury to the inheritance, not occasioned directly by an act of God, or of a public enemy, and will be considered much more fully hereafter.⁴⁹

Waste may arise from neglect merely, or from acts committed by a stranger (who in legal contemplation is presumed to have the acquiescence of the tenant), in which cases it is termed permissive waste; or it may arise from the voluntary and deliberate act of the tenant, such as the cutting of timber, etc., in which case it is voluntary waste.⁵⁰ Thus, if a house be unroofed by a tempest, this is not waste, because occasioned directly by an act of God; but to permit any further incidental injury to accrue for want of a roof, temporary or permanent, is permissive waste.⁵¹

At common law those persons only were responsible for waste who, not having the inheritance (the owner of which was of course

⁴⁵ *Jackson v. Vincent*, 4 Wend. (N. Y.) 633, 636, 637. See *Emerick v. Taverner*, 9 Grat. (Va.) 220, 58 Am. Dec. 217.

⁴⁶ *Jackson v. Richards*, 6 Cow. (N. Y.) 617, 620; *Merryman v. Bourne*, 9 Wall. 592, 601, 19 L. Ed. 683; *Walden v. Bodley*, 14 Pet. 156, 162, 10 L. Ed. 398.

⁴⁷ *Neff v. Ryman*, 100 Va. 523, 42 S. E. 314; *Erskine v. North*, 14 Grat. (Va.) 60, 66; *Creekmur v. Creekmur*, 75 Va. 430.

⁴⁸ Post, § 357.

⁴⁹ Post, § 379 et seq.

⁵⁰ Post, §§ 381 et seq., 391; 2 Min. Insts. 112; 3 Th. Co. Lit. 234, note (F); 1 Washburn, Real Prop. 146 et seq.

⁵¹ Post, § 386; 2 Min. Insts. 112.

incapable of committing it), had come into the possession by act of the law, either as tenants by the curtesy, in dower, or as guardians in chivalry. Tenants who came in by act of the parties were restrained only by their covenants. But the statute of Marlebridge, 52 Hen. III, c. 23, made all tenants for life or years liable for waste.⁵²

The penalty for waste at common law is merely the damage actually sustained, as estimated by a jury. But, that being found insufficient to prevent it, the statute of Gloucester, 6 Edw. I, c. 5, directed that the tenant should forfeit the thing (i. e., the place) wasted, and in addition three times the amount of the damage actually sustained by the owner of the inheritance.⁵³

§ 200. VI. Life Tenant's Right to Remove Fixtures. The general nature of fixtures, and the principles controlling their removability by a tenant, who has placed them upon the leased premises for his own profit and convenience, without making him liable as for waste, have been discussed in earlier sections of this work.⁵⁴

In this connection the student need only be reminded that the attaching of fixtures by a life tenant furnishes more of a basis for the presumption that the fixture is a real fixture, intended as a permanent addition to the freehold, than where they are attached by a tenant for years; and hence there is a less degree of removability as between tenant for life and the reversioner or remainderman than there is as between landlord and tenant for years.⁵⁵

§ 201. VII. Life Estates Subject to Merger. If a life estate come into the same hands as hold the fee simple or other freehold interest, and by the same sort of title, the general rule is that the greater freehold merges or extinguishes the lesser. Hence, if a fee simple, fee qualified or fee tail pass by descent, conveyance or devise to a life tenant, the life estate previously in the tenant is merged in the greater estate thus coming into his hands.⁵⁶

If the inheritance thus granted to the life tenant be granted him upon a condition subsequent, the merger takes place notwithstand-

⁵² Post, § 390 et seq.; 2 Min. Insts. 112, 113; 2 Bl. Com. 282 et seq.; 3 Th. Co. Lit. 241, note (M).

⁵³ Post, § 392; 2 Min. Insts. 113; 2 Bl. Com. 283, 284; 3 Th. Co. Lit. 241, note (M).

⁵⁴ Ante, § 22 et seq.

⁵⁵ Ante, § 36.

⁵⁶ 1 Washburn, Real Prop. 124; Bradford v. Griffin, 40 S. C. 468, 19 S. E. 76; Hovey v. Nellis, 98 Mich. 374, 57 N. W. 255; Mudd v. Mullican, 12 S. W. 263, 11 Ky. Law Rep. 417; Bennett v. Trustees M. E. Church, 66 Md. 36, 5 Atl. 291; Harrison v. Moore, 64 Conn. 344, 30 Atl. 55.

ing the condition. And the subsequent breach of the condition will, it seems, deprive the grantee not only of the inheritance thus conditionally conveyed to him, but also of his original life estate, since that has been merged into the inheritance and extinguished.⁵⁷

As between two life estates, since an estate for the tenant's own life is always regarded, as to him, as more beneficial and therefore a larger estate than an estate *pur auter vie*, the latter merges in the former, and upon the life tenant's death, living the former *cestui que vie*, no interest remains to him.⁵⁸

On the other hand, if a term for years and a freehold estate come into the same hands, the freehold usually merges and extinguishes the term for years.⁵⁹

§ 202. VIII. Life Tenant's Duties and Rights as to Repairs and Improvements. In the absence of express stipulation, it is not the duty of a tenant for life or for years to repair the premises further than is necessary to prevent liability for waste. *A fortiori*, he is not compellable to make improvements.⁶⁰

On the contrary, the question has rather been in these cases whether the life tenant or his personal representative or assignee can recover of the reversioner or remainderman the value of the repairs or improvements he has voluntarily placed upon the premises. The better view is that at common law he has no such right.⁶¹ Thus, if a life tenant conveys to another a fee simple (which in law would only operate as an assignment of the grantor's life estate), and the assignee places permanent improvements upon the premises, the reversioner is at common law entitled to the improvements as well as to the land, and the assignee is entitled to no compensation therefor.⁶²

⁵⁷ 1 Washburn, Real Prop. 124; Co. Lit. 218b.

⁵⁸ 2 Min. Insts. 198; 3 Preston, Conv. 225; 1 Washburn, Real Prop. 123; Boykin v. Ancrum, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698. But see Rosse's Case, 5 Co. 13a; Snow v. Boycott, [1892] 3 Ch. 110. In the absence of any other method of determining the relative extent of the two freeholds, as in the case of the two estates *pur auter vie*, it is probable that recourse must be had to the principle that, as between two estates of the same degree, the reversionary estate shall be presumed the greater, merging the other estate. See 2 Min. Insts. 197, 198.

⁵⁹ 2 Min. Insts. 197; 2 Th. Co. Lit. 557, note (K).

⁶⁰ Ante, § 199; Brough v. Higgins, 2 Grat. (Va.) 408, 412; Kearney v. Kearney, 17 N. J. Eq. 59, 70. But see *In re Steele*, 19 N. J. Eq. 120.

⁶¹ Corbett v. Laurens, 5 Rich. Eq. (S. C.) 301; Wilson v. Parker (Miss.) 14 So. 264; Merritt v. Scott, 81 N. C. 385; Hagan v. Varney, 147 Ill. 281, 35 N. E. 219. See *Datesman's Appeal*, 127 Pa. 348, 17 Atl. 1086, 1100; *Caldwell v. Jacob*, 27 S. W. 86, 16 Ky. Law Rep. 21.

⁶² Ante, § 21; Hagan v. Varney, 147 Ill. 281, 35 N. E. 219.

If premises already insured against fire come to one for his life, with remainder or reversion in another, and a fire occurs, entitling the owner to the insurance money in whole or in part, questions may arise as to the ownership of the insurance money, and the duty to apply it to the rebuilding of the house or the repairing of the damage caused by the fire.⁶³

In *Haxall v. Shippen*,⁶⁴ it was held that, where the building was totally or nearly destroyed, the realty was in effect converted into personalty, taking the form of the insurance money, and the parties thereafter had a like interest in the insurance money that they before had in the building; that is, the tenant for life was entitled to the use of it or the income from it for his life, and the reversioner or remainderman to the principal upon the life tenant's death. And the life tenant cannot by applying the money to the rebuilding of the house (without his successor's assent) defeat the successor's right to the principal of the insurance money after the life tenant's death. Nor, on the other hand, can the reversioner or remainderman compel the life tenant to apply the money to the rebuilding of the house. Both must consent in order that the insurance money may be legitimately so employed.

But it is otherwise if the extent of damage to the house by fire is comparatively small. In *Brough v. Higgins*,⁶⁵ under such circumstances, when the life tenant had repaired the building at her own expense, it was held that she was entitled to be fully reimbursed out of the insurance money.

§ 203. IX. Life Tenant's Duty to Keep Down Interest and to Pay Incumbrances. If property comes to a life tenant already subject to a mortgage or other incumbrance, it is the duty of the life tenant to pay the interest annually accruing on the debt so secured until it is paid off—throughout his whole life, if the incumbrance does not mature sooner. If he fails to do so, he is liable to the reversioner or remainderman for any loss that may result.⁶⁶

But if the debt falls due and the incumbrance is foreclosed in the tenant's lifetime, as between himself and the reversioner or remainderman, he is not bound to pay the whole principal, but only so

⁶³ *Haxall v. Shippen*, 10 Leigh (Va.) 536, 34 Am. Dec. 745; *Brough v. Higgins*, 2 Grat. (Va.) 408.

⁶⁴ 10 Leigh (Va.) 536, 34 Am. Dec. 745.

⁶⁵ 2 Grat. (Va.) 408.

⁶⁶ 1 Washburn, Real Prop. 129; *Banks v. Sutton*, 2 P. Wms. 716; *Barnum v. Barnum*, 42 Md. 251; *Thomas v. Thomas*, 17 N. J. Eq. 356; *Hunt v. Watkins*, 1 Humph. (Tenn.) 498; *Wade v. Malloy*, 16 Hun. (N. Y.) 226. See 2 Min. Insts. 142.

much thereof as would correspond to the aggregate of all the annual payments of interests that would accrue, were he to continue paying the same during his life, reduced to cash calculated at compound interest; the duration of the tenant's life being computed according to approved mortality tables, making due allowance for the peculiar conditions of each case.⁶⁷

§ 204. Same—Mode of Ascertaining Present Value of a Life Estate. In case of a commutation of a life estate into money, as upon a sale of a life tenant's interest or otherwise, it often becomes important to ascertain with accuracy the present value of the life estate. Independently of statute, this is usually accomplished by means analogous to, or rather the reverse of, the method used to compute the proportion a life tenant is to pay upon the principal of an incumbrance falling due and foreclosed in the tenant's lifetime, described in the preceding section. In the latter case, it will be remembered, the amount to be paid by the life tenant is the aggregate of his annual interest payments (continued during his whole life) reduced to cash calculated at compound interest.⁶⁸

In the case now to be considered the question is, how much is to be paid to the life tenant in lieu of his life estate in the land? This is estimated, independently of statute, by ascertaining the average annual profits coming, or which should come, to him from the estate, computing the duration of his life as before, and aggregating the cash value at compound interest, of such annual profits extending through his whole lifetime.⁶⁹

⁶⁷ 2 Min. Insts. 143; 1 Washburn, Real Prop. 129, 130, 131; Wilson v. Davisson, 2 Rob. (Va.) 384; Harper v. Vaughan, 87 Va. 426, 12 S. E. 785; Abercrombie v. Riddle, 3 Md. Ch. 320; Bell v. Mayor, 10 Paige (N. Y.) 49; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Atkins v. Kron, 43 N. C. 1.

While tables of mortality are necessary for accurate computations of the duration of the life, the following rule of De Moivre (De Moivre, Chances and Annuities, 265, 283) produces approximate results, and may be used in rough calculations: Regarding eighty-six as practically the extreme limit of human life, deduct the actual age of the party from that number and divide the remainder by two; the quotient being the probable further duration of the life in question. Thus, supposing one to be fifty years old, his probable expectation of life is expressed by $\frac{86-50}{2} = \frac{36}{2} = 18$ years. 2 Min. Insts. 144, 145, note.

⁶⁸ Ante, § 203.

⁶⁹ 2 Min. Insts. 143, and note; 3 Va. Law Reg. 69 et seq.; Wilson v. Davisson, 2 Rob. (Va.) 384. This may be done arithmetically, thus: Supposing the life tenant's probable duration of life, as derived from the tables

§ 205. **X. Life Tenant's Duty to Pay Taxes and Local Assessments.** Since taxes and local assessments are liens upon the land, the same general principles govern the life tenant's duties here as in case of other incumbrances.⁷⁰

Taxes are annual payments, like the interest payments upon an incumbrance, and it is therefore the duty of the life tenant to meet them regularly and promptly. Indeed, it is generally required that the land shall be listed for taxation in the name of the life tenant, if there be one.⁷¹

But assessments for local benefits, paid in lump by the life tenant, are analogous to the case of the payment of the principal of the incumbrance, not of the payment of annual interest thereon merely; and hence the life tenant, upon payment of such assessments, is entitled to contribution from the reversioner or remainderman, just as he would be if called upon to pay the principal of any other incumbrance on the land.⁷²

§ 206. **XI. Life Tenant's Duty to Defend the Title, if Attacked.** It was a principle of the old common law that no person could be made defendant in a real action save the tenant of the freehold,⁷³ and in order to prevent injury or loss to the reversioner or remainderman, or to a sublessee, it was the duty of a life tenant to defend

of mortality, is five years, and her annual income from the property is sixty dollars, the computation would be as follows:

First year's income paid now instead of at end of first year....	\$ 56.604
Second year's income paid now instead of at end of second year....	53.400
Third year's income paid now instead of at end of third year....	50.377
Fourth year's income paid now instead of at end of fourth year....	47.525
Fifth year's income paid now instead of at end of fifth year....	44.855
Present value of the life estate.....	\$252.761

But this process is intolerably tedious, if the annual sum be considerable and the probable duration of life long. For another method, by the use of logarithms, the student is referred to 2 Min. Insts. 143, note.

⁷⁰ Ante, § 203.

⁷¹ See, for the doctrine independently of statute, *Jenks v. Horton*, 96 Mich. 13, 55 N. W. 372; *Watkins v. Green*, 101 Mich. 493, 60 N. W. 44; *Gunning v. Carman*, 3 Redf. Sur. (N. Y.) 71; *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796; *Johnson v. Smith*, 5 Bush (Ky.) 102.

⁷² Ante, § 203; 1 Washburn, Real Prop. 130; *Reyburn v. Wallace*, 93 Mo. 326, 3 S. W. 482; *Moore v. Simonson*, 27 Or. 117, 39 Pac. 1105. There may be some question, however, whether the principle applicable here is not rather that applied to improvements placed upon the land by the life tenant, in which case he has no right of contribution from his successor. Ante, § 202.

⁷³ Ante, § 136.

such actions to the uttermost, calling to his assistance (or "praying in aid"), if he thinks fit, the reversioner or remainderman.⁷⁴

This right of "praying in aid" was mainly incident to the writ of right, and with the abolition of that writ by statute in this country, and the introduction of the statutory action of ejectment, the "prayer in aid" has also ceased to exist, at least in its common-law form.

§ 207. XII. Apportionment of Rent upon Life Tenant's Death, in Case of a Sublease. If a tenant for life leases to an undertenant, and dies during the sublease, one of two conditions might occur at common law: (1) The life tenant might die upon a day intermediate between the dates fixed for the payment of the rent; or (2) he might die on the very day appointed for the payment of some installment of the rent.

If the life tenant die upon an intermediate day, at common law the property at once went over to the reversioner or remainderman (unless the life tenant were given a special power to lease for a longer period than his own life), the sublessee's estate was at once terminated, and he was not required to pay any of the rent accrued since the last rent day, on the ground of failure of consideration and because the contract to pay rent was an entire thing which, agreeably to the maxim, "*Annua nec debitum judex non separat*," could not be apportioned.⁷⁵

But if the life tenant died on the very rent day itself, though the rent was not strictly due until midnight of that day, allowance was at common law made for the extraordinary hardship of the case, and the entire rent was held to be payable to the life tenant's personal representative as though it had already accrued.⁷⁶

The latter rule probably remains as at common law, but the former has been altered in England by the statute 11 Geo. II, c. 19, enacting that under the circumstances first above described the rent shall be apportioned, and that so much of the rent as shall have fallen due at the termination of the life estate shall be paid by the undertenant to the personal representative of the life tenant or, if he be a tenant *pur auter vie*, shall be paid to himself.⁷⁷ And simi-

⁷⁴ 1 Washburn, Real Prop. 78, 129; 1 Preston, Est. 207, 208.

⁷⁵ 2 Min. Insts. 52, 113; 2 Bl. Com. 124; 1 Th. Co. Lit. 476, note (P. I.); Ex parte Smyth, 1 Swanst. 338, 339, note; Clun's Case, 10 Co. 123a; Clun v. Fisher, 2 Cro. (Jac.) 309; Jenner v. Morgan, 1 P. Wms. 392; Norris v. Harrison, 2 Madd. 268.

⁷⁶ 2 Min. Insts. 52, 113; Bac. Abr. Rents (H); Strafford v. Wentworth, 1 P. Wms. 180; Ex parte Smyth, 1 Swanst. 344, note.

⁷⁷ 2 Min. Insts. 53.

lar statutory provisions have been generally enacted in this country.⁷⁸

Under the English statute, which in terms applies only in case of a sublease made by a tenant for life, it has been repeatedly held that the common-law rule is not thereby obviated which declares that the rent follows the reversion, and that, upon the death of a lessor seised in fee simple before the rent becomes due, the rent is payable to his heir, and not to his personal representative.⁷⁹

⁷⁸ 2 Washburn, Real Prop. (6th Ed.) § 1209.

⁷⁹ 2 Min. Insts. 53; 1 Lom. Dig. 736; *Norris v. Harrison*, 2 Madd. 268; *Duppa v. Mayo*, 1 Saund. 288c, note (17) (2). The English statute is held to apply to those cases only where the lease comes to an end by the occurrence of the event which raises the question. If, notwithstanding the lessor's death, the lease binds the reversioner or remainderman, as would be the case if the lessor owned the property in fee, or has leased under a power to execute a lease extending beyond his own life estate, the mischief aimed at by the statute does not arise. In such case the reversioner or remainderman will always succeed to the whole rent, without abatement. 2 Min. Insts. 53; *Strafford v. Wentworth*, Prec. in Chan. 556, 557; *Clun's Case*, 10 Co. 128a, n. (F); *Ex parte Smyth*, 1 Swanst. 351 (opinion of Lord Kenyon).

CHAPTER XII.

LIFE ESTATE BY THE CURTESY.

- § 208. Definition of Estate by the Curtesy.
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§ 208. **Definition of Estate by the Curtesy.** Most of the important points touching the estate by the curtesy flow from the definition, which it is necessary therefore to master thoroughly. It may be defined as follows:

When a man takes a wife lawfully seised at any time during the coverture of an estate of inheritance, legal or equitable, such as that the issue of the marriage may by possibility inherit it as heirs to the wife, has issue by her born alive during the coverture, and the wife dies, the husband surviving has an estate in her lands for his life, by way of prolongation annexed by law to the wife's estate, which is called an estate by the curtesy.¹

¹ 2 Min. Insts. 114; 2 Bl. Com. 126; 1 Th. Co. Lit. 551, 556, et seq.; Paine's Case, 8 Co. 35a.

§ 209. **Origin of the Estate by the Curtesy.** The full designation of the estate is "the estate by the curtesy of England" (Latin, *per legem Angliæ*). It is so called, says Littleton, because it "is used in no other realm but in England only,"² which seems to be a mistake in fact; for not only is it found in Scotland and Ireland (whither it may have been introduced from England), but it prevails or did prevail formerly in other countries also, though not under this name. The laws of the Alemanni (Germans) define the estate almost in the very terms used by the laws of England. Blackstone considers that it takes its name from the husband's attendance on the lord's court (*curtis*) as one of the vassals in right of his wife, whilst Mr. Wooddeson and Mr. Christian are disposed to hold that it originally signified nothing more than an estate by the courts of England, as in Latin the tenant is styled "*tenens per legem Angliæ*." This last opinion seems the most satisfactory.³

§ 210. **Requisites for Curtesy—Enumeration.** The requisites for curtesy, as disclosed by the definition, the discussion of which will go far towards unfolding the whole subject, are as follows: (1) Marriage; (2) the seisin of the wife at some time during the coverture; (3) the inheritance must also be in the wife, such as that the issue of the marriage may by possibility inherit it as heirs of the wife; (4) issue must be born alive during the coverture; (5) the death of the wife; and (6) the curtesy must be a prolongation of the wife's estate annexed by law.

§ 211. **I. The Marriage Necessary for Curtesy.** Since the right of curtesy is dependent upon a marriage between the parties, a marriage which is absolutely void, being in law no marriage at all, is not sufficient.⁴ Nor for the same reason will a voidable marriage suffice; that is, if it be actually avoided by a decree of court during the lifetime of the parties (it cannot be avoided afterwards).⁵

§ 212. **Same—Effect of Divorce.** Where the marriage is dissolved by divorce, a distinction must be taken between a divorce *a vinculo* and a divorce *a mensa*.

In case of a divorce *a vinculo*, though the marriage terminates only from the date of the decree, it is now well settled generally

² Lit. § 35.

³ 2 Min. Insts. 115; 1 Th. Co. Lit. 586, note (A); 2 Bl. Com. 126, 127, note (8); 1 Washburn, Real Prop. 170.

⁴ 2 Min. Insts. 115, 116; 1 Th. Co. Lit. 557, note (B); 1 Washburn, Real Prop. 172; *Turner v. Meyers*, 1 Hagg. Consist. 414.

⁵ 1 Washburn, Real Prop. 172; 1 Th. Co. Lit. 557, note (B). See 2 Min. Insts. 117, 118.

throughout the United States that curtesy (and in a corresponding case, dower) in the lands of the divorced consort must be denied, since until the coverture is terminated it is a mere inchoate right or contingent possibility, and not a vested interest.⁶

In case of a divorce a mensa, the right to curtesy (or dower) was not, at common law, in the least affected, nor were any of the other marital rights of either consort in the property of the other. Its sole effect was to separate the parties and permit them to live apart.⁷

§ 213. II. The Seisin of the Wife Requisite for Curtesy. The definition of curtesy⁸ requires that the wife should be "seised of the land at some time during the coverture."

The seisin of a freehold, as has been elsewhere pointed out,⁹ may be either a seisin in fact (which may be actual, or constructive under the statutes of uses and of wills, which did away with the necessity of an actual livery of seisin) or a seisin in law. Both of these forms of seisin are to be carefully distinguished from a mere right of entry upon or action for land, which arises where some one other than the true owner is in adverse possession of the land.¹⁰

Seisin in law, it will be remembered, arises where land comes to one by descent (act of the law) and before the heir has entered upon the land himself, or by his agent or tenant; there being no one else in adverse possession.¹¹

Seisin in fact or in deed arises where the true owner is in actual or constructive possession of land—actual, where he (or his agent or tenant) holds the land by visible actual occupation and possession; constructive, where, having derived his title by purchase, as under a deed or will, not by descent, he has not actually occupied the land, but no one else is in adverse possession thereof, the

* Porter v. Porter, 27 Grat. (Va.) 600; Cralle v. Cralle, 79 Va. 188; Barrett v. Failing, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505; Wait v. Wait, 4 N. Y. 101; Barbour v. Barbour, 46 Me. 9; Billan v. Hercklebrath, 23 Ind. 71; McKean v. Brown, 83 Ky. 208; Rice v. Lumley, 10 Ohio St. 596; McCraney v. McCraney, 5 Iowa, 232, 68 Am. Dec. 702. In those states where the tenancy by curtesy initiate (which is at common law a vested estate immediately upon the birth of issue during the coverture) still exists, it may be that a divorce a vinculo subsequent to the birth of issue would not deprive the husband of his curtesy. Meacham v. Bunting, 156 Ill. 586, 41 N. E. 175, 26 L. R. A. 618, 47 Am. St. Rep. 239. But see Wheeler v. Hotchkiss, 10 Conn. 225; Mattocks v. Stearns, 9 Vt. 326.

⁷ 2 Min. Insts. 121, 122; 2 Bl. Com. 130; Seagrave v. Seagrave, 13 Ves. 443; Dean v. Richmond, 5 Pick. (Mass.) 461; Clark v. Clark, 6 Watts & S. (Pa.) 85; Walsh v. Kelly, 34 Pa. 84.

⁸ Ante, § 208.

⁹ Ante, § 131.

¹⁰ Ante, § 131.

¹¹ Ante, § 131.

title in such case, by virtue of the statutes of uses and wills, being complete without entry. It is further to be observed in this connection that the title to an equitable estate is not a mere right of entry or of action, but a seisin, which may be a seisin in law or a seisin in fact (actual or constructive) according to the circumstances.¹²

§ 214. Same—Seisin in Fact (Actual or Constructive) Usually Required for Curtesy. If the wife has only a right of entry or of action, the husband can never, at common law, take curtesy;¹³ and if she has during the coverture merely a seisin in law, the husband has curtesy only in exceptional cases hereafter to be noted.¹⁴

The general rule of the common law is that, in order that the husband may have curtesy, the wife must be seised in fact at some time during the coverture.¹⁵ This seisin may be constructive, as well as actual, and if the wife derives the land, not by descent, but by purchase, as by deed under the statute of uses, or by will, there being no one in adverse possession, her title is complete even without entry, and the husband's curtesy attaches.¹⁶

So, also, upon the principle that the possession of one joint-tenant, tenant in common or coparcener is the possession of all, the husband of such a co-tenant, although she has never been in actual possession of any part of the land during the coverture, is entitled to curtesy therein, since she has been constructively seised in fact on account of the possession of the land by one or more of her co-tenants.¹⁷

A reason frequently assigned for requiring seisin in fact for curtesy is that otherwise the issue of the marriage could not inherit as heirs of the wife; the common-law rules of descent re-

¹² Ante, § 131; 2 Min. Insts. 122, 123; *Carpenter v. Garrett*, 75 Va. 129; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 434; *McCorry v. King*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165.

¹³ Post, § 216; 2 Min. Insts. 125.

¹⁴ Post, § 215; 2 Min. Insts. 124.

¹⁵ 2 Min. Insts. 122 et seq.; 2 Bl. Com. 127; 1 Th. Co. Lit. 558, note (6); 2 Th. Co. Lit. 177, 179; *Barwick's Case*, 5 Co. 94; *Stevens v. Smith*, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205; *Carr v. Givens*, 9 Bush (Ky.) 679, 15 Am. Rep. 747; *Vanarsdall v. Fauntleroy*, 7 B. Mon. (Ky.) 401; *Malone v. McLaurin*, 40 Miss. 161, 90 Am. Dec. 320.

¹⁶ 2 Min. Insts. 123; 1 Washburn, Real Prop. 181; *Carpenter v. Garrett*, 75 Va. 129, 135; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 434; *McCorry v. King*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; *Malone v. McLaurin*, 40 Miss. 161, 90 Am. Dec. 320.

¹⁷ Post, §§ 727, 758, 771; 1 Washburn, Real Prop. 137; *Sterling v. Pennington*, 2 Eq. Cas. Abr. 730; *Wass v. Bucknam*, 38 Me. 360.

quiring for that purpose actual seisin in the ancestor.¹⁸ That this, however, cannot be the real reason, is shown by the fact that while, for purposes of descent, the seisin must be in the ancestor at the time of his death, for purposes of curtesy it is not necessary that the wife should die seised, but only that she be seised at some time during the coverture,¹⁹ and furthermore by the fact that dower (which by its definition, like curtesy, requires that the deceased consort should have been seised of such an estate as that the issue of the marriage may inherit as heirs) should demand *pari ratione*, were this the true reason, an actual seisin by the husband, whereas it is a familiar principle that for dower it is sufficient if the husband have a seisin in law.²⁰

The true reason for requiring for curtesy a seisin in fact in the wife seems to be in order to stimulate the husband to employ proper diligence in reducing his wife's title to lands into actual possession, so that her interests may not suffer by his neglect. A parallel policy is adopted by the common law in respect to a wife's choses in action, which do not by that law become the husband's unless he reduce them to possession during the coverture.²¹ Lord Coke hints at this reason when, having stated seisin in law to suffice for dower, he accounts for the diversity in respect to curtesy by observing that "it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land."²²

But this principle does not extend so far as to deprive the husband of curtesy if he permits one to disseise, the wife during the coverture, though such disseisin continues throughout the residue of their married life, provided that at some time during the coverture she was seised in fact.²³

¹⁸ 2 Min. Insts. 123, 527; 2 Bl. Com. 208; 1 Th. Co. Lit. 577, 578; post, § 798.

¹⁹ 2 Min. Insts. 123, 527; 2 Bl. Com. 208; 1 Th. Co. Lit. 557; post, § 218.

²⁰ Post, § 241; 2 Min. Insts. 123; 1 Th. Co. Lit. 574.

²¹ 2 Min. Insts. 124; 1 Washburn, Real Prop. 181. It seems such a reduction of the wife's lands into possession might be made by a vendee, after a sale by the wife and husband under a deed, and such reduction would redound to the husband's benefit and give him curtesy, if the deed to the vendee should turn out to be void for want of proper acknowledgment by the wife or for other reasons. See *Vanarsdall v. Fauntleroy*, 7 B. Mon. (Ky.) 401.

²² 1 Th. Co. Lit. 574; 3 Th. Co. Lit. 309, 310, note (O); 2 Min. Insts. 124. See *Den v. Demarest*, 21 N. J. Law, 525.

²³ *Borland v. Marshall*, 2 Ohio St. 308; *Mitchell v. Ryan*, 3 Ohio St. 377. But it seems to be otherwise if the adverse possession continues so long as to vest title in the adverse occupant. *Stokely v. Slayden*, 8 Baxt. (Tenn.) 307; *Crow v. Kightlinger*, 25 Pa. 343.

§ 215. Same—Wife's Seisin in Law When Sufficient for Curtesy. The general rule is that seisin in law on the part of the wife does not suffice to give the husband curtesy. Hence, where an ancestor dies leaving land to descend upon his heir (a married woman), who dies before she actually enters (or in case of an incorporeal hereditament before she actually uses or enjoys it), there being no one in adverse possession, she is only seised in law during the coverture, and the husband is ordinarily denied curtesy.²⁴

There are, however, some exceptional cases wherein curtesy is allowed, even though the wife be seised only in law.

One such case is where it is impossible to obtain seisin in fact during the coverture. Thus, if a man seised of a rent in fee hath issue, a daughter, who is married and hath issue, and he dieth seised, and the daughter before the rent becomes due dieth, she had but a seisin in law, and yet the husband shall be tenant by the curtesy, because he could by no industry attain to any other seisin.²⁵

It is to be observed, further, that if the wife be one of several heirs, upon the principle that the possession of one coparcener (coheir) is the possession of all,²⁶ the fact that her coparceners have entered and taken possession will redound to her benefit and will make her seised in fact, though she herself (or her agent or tenant) has never entered. Hence, the other conditions existing, her husband is entitled to curtesy.²⁷

§ 216. Same—No Curtesy in Mere Right of Entry or of Action. Upon common-law principles already mentioned, no curtesy is allowed (unless by statute) in mere rights of entry upon or of action for lands in the adverse possession of another; that is, where such adverse possession continues throughout the coverture.

§ 217. Same—Sole Seisin by the Wife. Another qualification of the wife's seisin arose out of the common-law principle of the *jus accrescendi* or survivorship between joint tenants.²⁸ In order that the husband be given curtesy at common law, it was necessary that the wife be sole seised; that is, that she be not seised as joint tenant with another, for in the latter event, upon the wife's death the

²⁴ 2 Min. Insts. 124; 2 Bl. Com. 127; 1 Th. Co. Lit. 559; *Carpenter v. Garrett*, 75 Va. 129, 135.

²⁵ 2 Min. Insts. 124; 1 Th. Co. Lit. 558, 559; *Shelley's Case*, 1 Co. 97; *DeGray v. Richardson*, 3 Atk. 469; *Eager v. Furnivall*, 17 Ch. Div. 115; *Davis v. Mason*, 1 Pet. 503, 7 L. Ed. 239; *Chew v. Commissioners of Southwark*, 5 Rawle (Pa.) 160; *Borland v. Marshall*, 2 Ohio St. 308.

²⁶ Post, § 771.

²⁷ *Carr v. Givens*, 9 Bush (Ky.) 679, 15 Am. Rep. 747.

²⁸ Post, § 732.

whole estate would at common law survive to the surviving joint tenant or tenants by a title superior to the husband's curtesy.²⁹

In the United States the doctrine of survivorship between joint tenants has been for the most part abolished.

Since the attribute of survivorship never belonged to tenancies in common or in coparcenary, the husband even at common law might have curtesy in lands so held by the wife.³⁰

§ 218. Same—Wife may be Seised at Any Time during the Coverture. In order that the husband may have curtesy, it is not necessary at common law that the wife should be seised of the land at the time of her death. It suffices that she is seised at any time during the coverture, either before or after the birth of issue;³¹ and the fact that she acquires the property after the child's death is immaterial.³²

At common law, however, since a married woman could only pass title to her lands by a fine or common recovery, which were collusive suits brought by the proposed purchaser against the wife, founded upon a pretended superior title, in which suit the husband must have been joined with the wife as defendant,³³ the husband could not in general claim curtesy in any lands conveyed by the wife during the coverture, because his joinder with her in the fine or recovery barred his curtesy, and so the practical result at common law was that he could only claim curtesy in the lands of which the wife was seised at her death (or in lands of which she had been dis-seised during coverture).³⁴

§ 219. Same—Wife's Seisin Unlawful or Wrongful. The husband's curtesy being carved out of the wife's estate, it is obvious that he can have no better title as tenant by the curtesy than the wife herself has during the coverture. Hence, if the wife, during the coverture, or the tenant by the curtesy after her death, is evicted by a stranger claiming under a paramount title, thus establishing that the wife never had a lawful seisin, it frustrates any claim to curtesy founded thereon, as under similar circumstances the wife's claim to dower is defeated.³⁵

²⁹ 2 Min. Insts. 124, 125, 476; 1 Th. Co. Lit. 564, 745, 746; post, § 732.

³⁰ 2 Min. Insts. 499, 507; Carr v. Givens, 9 Bush (Ky.) 679, 15 Am. Rep. 747; Wass v. Bucknam, 38 Me. 356.

³¹ Comer v. Chamberlain, 6 Allen (Mass.) 166; Hunter v. Whitworth, 9 Ala. 965.

³² Jackson v. Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; Phillips v. Ditto, 2 Duv. (Ky.) 549; Templeton v. Twitty, 88 Tenn. 595, 14 S. W. 435.

³³ 2 Min. Insts. 991 et seq.; post, § 282.

³⁴ Ante, § 294.

³⁵ 2 Min. Insts. 128, 129; 1 Th. Co. Lit. 560, note (D), 618, note (R); 4 Kent, Com. 32, 33.

But it should be observed that the husband of one wrongfully seised may hold his curtesy against all persons save him to whom the seisin rightfully belongs and those claiming under him.³⁶

§ 220. III. *The Wife's Estate of Inheritance.* In order to curtesy, not only must the wife have the seisin in fact—that is, the immediate freehold in possession (actual or constructive)—but she must also have an estate of inheritance in the land of which she is seised. Hence seisin in fact, standing alone, does not necessarily give curtesy, for the wife may be seised in fact of a life estate merely. She must have the inheritance.³⁷

For curtesy, therefore (and the same is true of dower), the deceased consort must have had some time during the coverture (1) the immediate seisin, or an estate of freehold in possession; (2) the first estate of inheritance; (3) without any intermediate estate of freehold.³⁸

Thus, if a woman seised in fee leases land to D. for D.'s life (or for her own), reserving rent throughout the term, marries, has issue, and dies before D.'s estate terminates (or at the same time), her husband cannot have curtesy in the land, because of that she has never, during the coverture, had the immediate estate of freehold in possession (that being in D.); nor in the rent, for in that she had no estate of inheritance, but only an estate for the life of D. (or for her own life).³⁹

But if the woman above supposed leases to D. for a term of years, the other circumstances remaining the same, and dies before the term is up, never having parted with the immediate freehold in possession, and entitled to the inheritance also, the husband will be given curtesy in the reversion after the term for years; that is, as owner of the reversion during his life he is entitled to the rent annually accruing from the lease, and after its termination to the land itself for the residue of his life.⁴⁰

Applying the same principles, it will be seen that upon a conveyance or devise "to A. for life, remainder to W. in fee" (A. and W. both being married women), the husband of A. has no curtesy

³⁶ 1 Washburn, Real Prop. 228.

³⁷ 2 Min. Insts. 127; *Muse v. Friedenwald*, 77 Va. 57; *Churchill v. Reamer*, 8 Bush (Ky.) 256; *Graves v. Trueblood*, 96 N. C. 495, 1 S. E. 918; *Waller v. Martin*, 106 Tenn. 341, 61 S. W. 73, 82 Am. St. Rep. 882; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; *Sumner v. Partridge*, 2 Atk. 47.

³⁸ 2 Min. Insts. 127; 1 Th. Co. Lit. 560, note (E & F); post, §§ 252, 253.

³⁹ 2 Min. Insts. 127; 1 Th. Co. Lit. 559, 560, note (10), 582; *Cocke v. Phillips*, 12 Leigh (Va.) 248; *Malone v. McLaurin*, 40 Miss. 161, 90 Am. Dec. 320; *Reed v. Reed*, 3 Head (Tenn.) 491, 75 Am. Dec. 777; *Moore v. Darby*, 6 Del. Ch. 193, 18 Atl. 768, 13 L. R. A. 346, 348.

⁴⁰ 2 Min. Insts. 127; 1 Th. Co. Lit. 559, 560, note (10), 582; *Moore v. Darby*, 6 Del. Ch. 193, 18 Atl. 768, 13 L. R. A. 346, 348.

upon her death, because A. has not an estate of inheritance; nor is W.'s husband entitled to curtesy, supposing W. to die during A.'s lifetime, because W. during the coverture is not seised of the immediate freehold in possession.⁴¹

So, also, where upon the death of the wife's ancestor she, as his heir, enters upon the land and assigns dower therein (that is, one-third) to the ancestor's widow for her life, and, having had issue, she dies in the lifetime of the ancestor's widow, the husband surviving is entitled to curtesy in the remaining two-thirds only of the inheritance derived by his deceased wife from her ancestor, and not in the one-third assigned to the ancestor's widow as her dower; for as to that third the wife's seisin was in contemplation of law terminated by the assignment of the widow's dower, not from the time of the assignment only, but by relation from the ancestor's death, so that in law she is not seised of that third at any time during the coverture.⁴² But if the ancestor's widow should die before the wife, the latter becomes immediately seised of the land wherein the former had been endowed, so that upon the wife's death the husband takes the whole land by way of curtesy.⁴³

§ 221. Same—No Intermediate Freehold Estate Permitted. As indicated in the preceding section, not only must the wife have the immediate freehold in possession and the first estate of inheritance, but there must be between these two estates no intervening vested estate of freehold; that is, it must not remain so throughout the coverture. An intervening vested remainder for a term of years only does not affect the husband's curtesy, nor perhaps does a contingent remainder, whether of freehold or for years, provided it remains contingent throughout the coverture, and does not become vested, or otherwise prevent a merger of the lesser freehold in possession by the inheritance.⁴⁴

Thus, a conveyance or devise "to W. for her life, remainder to B. for life, remainder to W. and her heirs," would give W. (1) the

⁴¹ *Malone v. McLaurin*, 40 Miss. 161, 90 Am. Dec. 320; *Reed v. Reed*, 3 Head (Tenn.) 491, 75 Am. Dec. 777.

⁴² 2 Min. Insts. 127, 128; 1 Th. Co. Lit. 574, 575; *Reed v. Reed*, 3 Head (Tenn.) 491, 75 Am. Dec. 777; *In re Cregier*, 1 Barb. Ch. (N. Y.) 598, 45 Am. Dec. 416. See post, § 250.

⁴³ These principles are applicable to dower as well as to curtesy, and when applied to dower find expression in the maxim, "*Dos de dote, peti non debet.*" Fuller explanations will be found in connection with the treatment of dower. Post, §§ 250, 251; 2 Min. Insts. 152, 153.

⁴⁴ Post, §§ 252, 253; 2 Min. Insts. 128; 2 Bl. Com. 137, note (30); 2 Th. Co. Lit. 292, note (1); 1 Bright, *Husb. & Wife*, 519; 1 Scribner, *Dower*, 233, 235. The termination during the coverture, by surrender or otherwise, of the intermediate freehold restores the right of curtesy (or dower). 1 Scribner, *Dower*, 234.

immediate freehold (for her life) in possession, and also (2) the first estate of inheritance (by virtue of the limitation to "W. and her heirs"); but W.'s husband would nevertheless be denied curtesy in general because of the interpolated freehold remainder in B., which is a vested remainder, and will continue so throughout the coverture unless B. dies during W.'s lifetime or the intermediate remainder is otherwise destroyed.⁴⁵

§ 222. Same—Wife's Inheritance must be Heritable by Issue of the Marriage as Heirs of the Wife. The husband's right of curtesy in the wife's estate of inheritance is subject by the terms of the definition itself to the further qualification that her estate must be such an estate of inheritance "as that the issue of the marriage may by possibility inherit the same as heirs to the wife."⁴⁶ Though by the terms of the deed or will creating the wife's estate the issue of the marriage are to take the estate upon her death, still if they are not to take as heirs of the wife (that is, by descent), but are to take as purchasers under the deed or will, the husband is denied curtesy.⁴⁷

Thus, if a testator devises land "to W. and her heirs, but if she die leaving issue, then to her children and their heirs," the husband has no curtesy, because any issue of the marriage taking the land at W.'s death take it by purchase as devisees expressly named in the will, and not by descent as heirs of the wife.⁴⁸ And this principle applies, it seems, even though the issue of the marriage may by possibility inherit as heirs of the wife, if that cannot possibly happen during the husband's lifetime. Thus, in *Sumner v. Partridge*,⁴⁹ the devise was "to the wife and her heirs, and if she die before her husband, then the estate to pass to her children and their heirs." It was held that the husband was not entitled to curtesy though the children of the marriage might by possibility take as heirs of the wife in the event of the wife surviving the husband. They were to take as devisees only in the event that the wife died before the husband; but that would be the very case in which the husband might claim curtesy.

So, also, if the wife has an estate tail female, and she has only male issue, the husband would at common law be denied curtesy.⁵⁰

⁴⁵ 2 Min. Insts. 128.

⁴⁶ Ante, § 208.

⁴⁷ 2 Min. Insts. 128; 1 Th. Co. Lit. 577, 578; *Barker v. Barker*, 2 Sim. 249; *Sumner v. Partridge*, 2 Atk. 37; *Adams v. Beekman*, 1 Paige (N. Y.) 631.

⁴⁸ 2 Min. Insts. 128; *Barker v. Barker*, 2 Sim. 249; *Adams v. Beekman*, 1 Paige (N. Y.) 631.

⁴⁹ 2 Atk. 37.

⁵⁰ 1 Washburn, Real Prop. 186; 2 Bl. Com. 128; *Day v. Cochran*, 24 Miss. 261; *Heath v. White*, 5 Conn. 228, 236.

§ 223. **Same—Wife's Inheritance may be Equitable as Well as Legal.** Upon the first introduction into England of equitable estates (that is, uses)—in the latter part of the reign of Edward III, about A. D. 1370—the common law refused to recognize them, and the courts denied curtesy in them. But the popularity of uses and the prompt conversion of most of the landed property of the realm into that form of holding speedily compelled the courts to retrace their steps, and to hold that the husband might have curtesy in the wife's equitable estates, provided the other requisites therefor existed.⁵¹

Even at common law the husband is entitled to curtesy, not only in estates of inheritance whereof the wife is seised as cestui que trust under an express trust, but also in money converted into land under the doctrine of equitable conversion and in the wife's equities of redemption.

Thus, if money is directed to be invested in land for the wife's benefit, or if before marriage she has become the vendee of land, though the money be not actually invested in land, nor a deed to the land she has purchased be actually made to her, at any time during the coverture, the husband is yet entitled in equity to curtesy therein, for equity regards that as done which ought to be done, and an equitable conversion of the money into land occurs.⁵² On the other hand, when land devised to the wife is directed by the will to be sold in the discretion of the executor, who sells accordingly, the husband is entitled to curtesy in the proceeds, since there was a time during the coverture when the wife was seised of the land itself, and a court of equity will regard the proceeds of the sale as land to protect the husband's curtesy right.⁵³

With respect to the wife's equities of redemption, incident to mortgages executed before the wife's marriage, the husband undoubtedly has curtesy therein, if the mortgage be not foreclosed in

⁵¹ 2 Min. Insts. 125; 2 Bl. Com. 127, note (9); 1 Washburn, Real Prop. 173; Sweetapple v. Bindon, 2 Vern. 536; Watts v. Ball, 1 P. Wms. 108; Hearle v. Greenbank, 3 Atk. 695, 717; Darcy v. Blake, 2 Sch. & Lefr. 388; Morgan v. Morgan, 5 Madd. 408; Davis v. Mason, 1 Pet. 503, 7 L. Ed. 239; Mullany v. Mullany, 4 N. J. Eq. 16, 31 Am. Dec. 238.

⁵² Sweetapple v. Bindon, 2 Vern. 536; Dodson v. Hay, 3 Bro. Ch. 404.

⁵³ Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504. So, where an executor or trustee sells the land of a female heir or cestui que trust under such circumstances that she has the option of confirming the sale and taking the money or avoiding the sale and taking back the land, and she elects to take the money, her husband is in equity entitled to curtesy therein, at least if she die before it is paid over. Houghton v. Hapgood, 13 Pick. (Mass.) 154. See, also, Clepper v. Livergood, 5 Watts (Pa.) 113; Forbes v. Smith, 40 N. C. 369.

the wife's lifetime, so that at her death the equity of redemption still subsists as an equitable interest in the land.⁵⁴ But if the mortgage is foreclosed in the wife's lifetime, whether the mortgage has been executed before or after the marriage, the surplus remaining after satisfying the mortgage debt is personalty.

§ 224. **Same—Curtesy in Wife's Equitable Separate Estate.** In the absence of a contrary intention shown by the settlor in the instrument of settlement, or appearing from the surrounding circumstances, the husband at common law takes curtesy in the wife's equitable separate estates of inheritance, whereof she is seised during the coverture; the general principle being that the marital rights of the husband are not to be divested further than the terms or circumstances of the settlement clearly require.⁵⁵

Thus, if the wife's separate estate is created by the gift of the husband himself, whether directly or through a trustee, it excludes the husband's curtesy in such lands, in the absence of a reservation by him of his marital rights in the land thus bestowed.⁵⁶

And so it would be if the settlement expressly excludes the husband's curtesy, or perhaps if it expressly gives the wife the power to convey as if she were unmarried, that is, without a joinder of the husband in her conveyance; for if he was intended to retain curtesy in the land so granted the settlor would not have authorized her to convey by her sole act.⁵⁷

So, also, if by necessary inference from the language used the intent of the settlor is manifest to exclude the husband's curtesy, as by a gift to the wife to her sole and separate use "free from all claims or demands of her husband now or at any time hereafter," the husband's curtesy is negatived.⁵⁸

If there is nothing in the language of the settlement to indicate an intention that the husband shall not enjoy his marital rights, a

⁵⁴ See 2 Min. Insts. 142; 1 Lom. Dig. 102; *Heth v. Cocke*, 1 Rand. (Va.) 344; *Gatewood v. Gatewood*, 75 Va. 407.

⁵⁵ 2 Min. Insts. 126; 1 Washburn, Real Prop. 176; *Maloney v. Kennedy*, 10 Sim. 254; *Mitchell v. Moore*, 16 Grat. (Va.) 275; *Carter v. Dale*, 3 Lea (Tenn.) 710, 31 Am. Rep. 660.

⁵⁶ 2 Min. Insts. 126; *Jones v. Jones*, 96 Va. 749, 32 S. E. 463; *Rigler v. Cloud*, 14 Pa. 361. But if the equitable separate estate be given by a third person to the husband as trustee for the wife, this conclusion does not necessarily follow. *Meacham v. Bunting*, 156 Ill. 586, 41 N. E. 175, 28 L. R. A. 618, 47 Am. St. Rep. 239.

⁵⁷ *Bennet v. Davis*, 2 P. Wms. 316; *Cochran v. O'Hern*, 4 Watts & S. (Pa.) 95, 39 Am. Dec. 60. But see *Carter v. Dale*, 3 Lea (Tenn.) 710, 31 Am. Rep. 660; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238.

⁵⁸ 2 Min. Insts. 126; *Chapman v. Price*, 83 Va. 394, 396, 11 S. E. 879; *Hutchings v. Commercial Bank*, 91 Va. 68, 20 S. E. 950.

different case is presented. In such case, in England, where the rule is that a married woman may convey her equitable separate estate, whether it be land or personalty, as if she were a feme sole, unless the settlement forbids, it is held very properly that the husband is not entitled to curtesy, for such must in legal contemplation have been the intent of the settlor.⁵⁹

§ 225. **Same—Curtesy in Wife's Statutory Separate Estate.** In the United States it is now generally provided by statute that, except the wife's equitable separate estate, all the property of a married woman "heretofore or hereafter acquired" shall be her statutory separate estate; but these statutes vary greatly as to the dominion which they concede to the wife over this class of property, and consequently as to what will operate to bar the husband's curtesy.

§ 226. **IV. For Curtesy Issue must be Born Alive during the Coverture.** It is difficult to assign a satisfactory reason for the requirement of the common law that for curtesy issue must be born alive during the coverture.

This requirement is possibly connected with the fact that curtesy was originally looked upon rather as an estate by descent than by purchase, and, being considered in some sort a prolongation of the wife's inheritance, was only permitted when the wife has issue.⁶⁰ But perhaps a more probable explanation may be found in the feudal policy that encouraged the feudatory to multiply children who might perform the military services, and that permitted him to remain during his life responsible for such services in the place of his children.

Whatever the reason, the rule itself is rigidly adhered to—so much so, indeed, that if the wife die in childbirth, and the child is after her death, by a Cæsarean section, ripped from the womb alive, no curtesy is allowed.⁶¹ The fact that the child is en ventre

⁵⁹ *Cooper v. McDonald*, L. R. 7 Ch. Div. 300; *Chapman v. Price*, 83 Va. 392, 394, 11 S. E. 879.

⁶⁰ This seems to be the explanation adopted by Mr. Washburn. 1 Washburn, Real Prop. 186. But it is unsatisfactory, since curtesy is no more a continuation of the wife's inheritance than dower is of the husband's, yet admittedly no issue is required for dower. Nor is it perceived why birth of issue is necessary to the continuation of the wife's inheritance, since she may have collateral heirs upon whom it may descend; and it is an established rule that though the wife die totally without heirs, if she has had issue born alive, the husband takes curtesy as a prolongation of the wife's estate. Post. § 230.

⁶¹ 2 Min. Insts. 133; 2 Th. Co. Lit. 562; 2 Bl. Com. 127; 1 Washburn, Real Prop. 187; *Paine's Case*, 8 Co. 35a; *Marsellis v. Thalhimier*, 2 Paige (N. Y.) 35, 21 Am. Dec. 66; *Goff v. Anderson*, 91 Ky. 303, 15 S. W. 866, 11 L. R. A. 825.

sa mere at the time of the wife's death, while reckoned by the law sufficiently in being to enable the child itself to take an estate for its own benefit, will not suffice to confer rights upon third persons. It must be actually born within the period required.⁶²

But it is immaterial whether the issue be born before or after the acquisition of the property, or whether the wife still owns the property at the time of the birth of the issue,⁶³ or whether she has acquired the property after the death of the issue.⁶⁴ Nor is it necessary, in order to give the husband curtesy, that the issue of the marriage should be the only heirs to inherit from the wife. Thus, if a wife, having issue born of a former marriage, marries again and has issue, the husband takes curtesy in all the wife's estates of inheritance, though the issue of that marriage must share the inheritance with the issue of the former marriage.⁶⁵

As to the evidence that the child is born alive, it was supposed during the infancy of medical science that the child must have been heard to cry. But in modern times any medical or other evidence of an independent circulation of the blood suffices.⁶⁶

It is an interesting inquiry how far, if at all, this rule requiring birth of issue during the coverture has been modified by the statutes, existing in many states, which permit the legitimation of bastards by a subsequent marriage of the parents. The proper answer depends in large measure upon the reasons for the common-law rule, which as we have seen are veiled in obscurity. It has been held in Alabama, however, that the legitimation of a bastard by subsequent marriage, though no issue be born in wedlock, entitles the husband to curtesy.⁶⁷

§ 227. Same—Tenancy by Curtesy Initiate at Common Law.

At common law, before the birth of issue the husband was entitled as a marital right to the use, control and management of the wife's freehold estates (except her equitable separate estate); but he held this interest only in right of his wife and jointly with

⁶² *Marsellis v. Thalhimier*, 2 Paige (N. Y.) 35, 21 Am. Dec. 66.

⁶³ 1 Co. Litt. 30a; 2 Bl. Com. 128; 1 Washburn, Real Prop. 186; *Comer v. Chamberlain*, 6 Allen (Mass.) 166; *Hunter v. Whitworth*, 9 Ala. 965; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 434; *Heath v. White*, 5 Conn. 228, 236; *Guion v. Anderson*, 8 Humph. (Tenn.) 307.

⁶⁴ 1 Co. Litt. 30a; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 434; *Templeton v. Twitty*, 88 Tenn. 595, 14 S. W. 435; *Phillips v. Ditto*, 2 Duv. (Ky.) 549.

⁶⁵ *Heath v. White*, 5 Conn. 228, 236.

⁶⁶ 2 Min. Insts. 133; 2 Bl. Com. 127; 1 Th. Co. Lit. 563.

⁶⁷ *Hunter v. Whitworth*, 9 Ala. 965. For curtesy in the case of a legally adopted child, see *Murdock v. Murdock*, 74 N. H. 77, 65 Atl. 392.

her, and by the feudal law he must do homage for the land in conjunction with her.⁶⁸

But, after the birth of issue alive during the coverture, the nature of the husband's interest during the remainder of the wife's life undergoes a change at common law. He at once becomes "tenant by the curtesy initiate" (which upon the wife's death is converted into "curtesy consummate"),⁶⁹ and as such he becomes entitled to rights other than and additional to the rights he possesses merely as husband. By the feudal law, from that time he does homage alone, and not in conjunction with the wife; and he may make a feoffment in fee or a lease for his life or a charge upon the lands which the heirs of the wife cannot during his lifetime avoid.⁷⁰ He may also forfeit his estate for felony, which until issue be born he could not do, because the wife, not he, is the tenant.⁷¹ After birth of issue, the husband's estate is not defeated by the attainder of the wife, the tenancy continuing in him as the sole tenant;⁷² and if, after birth of issue, the husband be disseised, the disseisor's possession, it is said, is adverse to him alone, not to the wife, nor her heirs, until his death.⁷³

Furthermore, after birth of issue, the husband's curtesy initiate is at common law liable to be subjected to his debts, nor can he defeat the creditor's rights by any disclaimer of his curtesy, nor by an appeal to equity on the part of his wife or children.⁷⁴

These and other like incidents pertaining to curtesy initiate seem to indicate that it should be regarded, for most purposes at least, as a vested interest in the husband, even before the death of the wife, and not a mere contingent possibility of interest, such as he has before the birth of issue.⁷⁵

⁶⁸ 2 Min. Insts. 134; 1 Th. Co. Lit. 558; Bac. Abr. Curtesy (D); Greneley's Case, 8 Co. 72b, 73a; Breeding v. Davis, 77 Va. 639, 646, 46 Am. Rep. 740; Barber v. Root, 10 Mass. 260; Van Note v. Downey, 28 N. J. Law, 219.

⁶⁹ 2 Min. Insts. 133, 134; 2 Bl. Com. 128; 1 Th. Co. Lit. 563, note (H).

⁷⁰ 2 Min. Insts. 134; 1 Th. Co. Lit. 558; Bac. Abr. Curtesy (D); Greneley's Case, 8 Co. 72b, 73a.

⁷¹ 2 Bl. Com. 126; Porter v. Porter, 27 Grat. (Va.) 604.

⁷² 1 Hale, P. C. 359; Co. Lit. 351a, 40a; Porter v. Porter, 27 Grat. (Va.) 604.

⁷³ Foster v. Marshall, 22 N. H. 491. But this is probably not the true rule. See Guion v. Anderson, 8 Humph. (Tenn.) 298, 325; McCorry v. King, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; Melvin v. Proprietors of Locks & Canals, 16 Pick. (Mass.) 161; Mellus v. Snowman, 21 Me. 201.

⁷⁴ 2 Min. Insts. 134; 1 Washburn, Real Prop. 189; Breeding v. Davis, 77 Va. 646, 46 Am. Rep. 740; Roberts v. Whiting, 16 Mass. 186; Van Duzer v. Van Duzer, 6 Paige (N. Y.) 366, 31 Am. Dec. 257.

⁷⁵ But statutes abolishing the curtesy of the husband, while held unconstitutional so far as they attempt to destroy the curtesy consummate (the

§ 228. **V. Death of the Wife.** The fifth requisite for curtesy is the death of the wife. Upon the happening of this event, the curtesy, which before was curtesy initiate, becomes curtesy consummate, vesting an immediate estate in the husband for his life in the whole of the wife's lands of inheritance. It is the natural, not the civil, death of the wife which consummates the husband's right of curtesy.⁷⁶

Immediately upon the wife's death the husband succeeds to her lands by act of the law, without the necessity of any assignment (such as is necessary in the case of dower); and since it comes to him by act of the law he cannot disclaim it or otherwise prevent it from vesting in himself.⁷⁷

§ 229. **VI. Curtesy a Prolongation of the Wife's Inheritance—General Rule.** Cases sometimes arise wherein, by reason of some collateral contingency, the wife's inheritance may come to an end, as where at common law she dies without any heirs, or in case of a fee tail she dies without heirs of her body, or where the estate terminates upon some condition or contingency.

In all such cases the general rule by which to ascertain whether curtesy (and the same rule applies to dower) shall be allowed may be thus stated:

If the consort's inheritance expires by the regular efflux of the period marked out by the original limitation of the estate, leaving the consort's previous seisin unimpaired, curtesy and dower are prolongations of the consort's estate annexed by law; and though that estate, according to its ostensible terms, has expired, yet (supposing the consort dead at the time of such expiration) curtesy and dower are annexed to the consort's estate as continuations thereof. But if the consort's estate is terminated in such a manner as to defeat, annul, or impair the previous seisin as from the beginning, or if the consort's estate terminates in his or her lifetime, or if the subject-matter of the consort's estate ceases to exist, in none of these

wife being dead at the date of the statute), as violating the fourteenth amendment to the federal Constitution declaring that "no state shall deprive any person of property [that is, vested property rights] without due process of law," have been held to be not unconstitutional when applicable to curtesy initiate, thus indicating that for this purpose at least the curtesy initiate is not a vested estate. *Alexander v. Alexander*, 85 Va. 369, 7 S. E. 235, 1 L. R. A. 125; *Porter v. Porter*, 27 Grat. (Va.) 599; *Moore v. Darby*, 6 Del. Ch. 193, 18 Atl. 768, 13 L. R. A. 346.

⁷⁶ 2 Min. Insts. 133, 134, 155; 2 Bl. Com. 132, 133; 1 Th. Co. Lit. 569, 580; *Breeding v. Davis*, 77 Va. 639, 646, 46 Am. Rep. 740; *Moore v. Darby*, 6 Del. Ch. 193, 18 Atl. 768, 13 L. R. A. 346, 347.

⁷⁷ 2 Min. Insts. 183; 1 Washburn, Real Prop. 142; *Watson v. Watson*, 13 Conn. 83.

cases can there be a continuation or "prolongation" of the consort's estate by way of curtesy or dower.⁷⁸

Applications of these principles will be given in the following sections.

§ 230. Same—Consort's Estate a Fee Simple or Fee Tail Where Consort Dies without Heirs. Let us first suppose the case where the consort is seised in fee simple and dies without any blood relations. In such case the consort's estate is terminated by the regular efflux of the period originally marked out for it (that is, while the consort had heirs); the consort's previous seisin remaining unimpaired. Here, the other conditions existing, the husband would be entitled to curtesy in the consort's estate, or the wife to dower therein, as continuations or "prolongations" of such estate annexed by law.⁷⁹

Upon similar principles, if the consort have an estate tail and die without surviving issue, the fee tail is terminated by the regular efflux of the period originally marked out for it, without impairing the consort's previous seisin, and therefore curtesy or dower would attach as a prolongation of the estate tail, which was in the consort until his or her death.⁸⁰

§ 231. Same—Consort's Estate a Fee Qualified. There seems to be considerable confusion amongst the text-writers as to whether curtesy and dower should be allowed in fees qualified or base fees, which, it will be remembered, are estates that may last forever, but may also come to an end at any moment by the lapse of some period of limitation originally contained in the grant.⁸¹ The general opinion seems to be that curtesy and dower are to be denied therein.⁸²

With deference, it is submitted, however, that this statement, if taken literally, is hardly maintainable upon principle or authority. Take, for example, a conveyance "to A. and her heirs, as long as B. has heirs of his body." Should A. marry, have issue and die, B. or the heirs of his body being still existent, A.'s husband must upon every principle be given curtesy; for A. is seised during the

⁷⁸ 2 Min. Insts. 129; 1 Th. Co. Lit. 561, note (13) and (G), 565, note (L); Paine's Case, 8 Co. 34a, 1 Leon. 167. See, also, the following sections.

⁷⁹ 2 Min. Insts. 130; 1 Bright, Husb. and Wife, 348.

⁸⁰ 2 Min. Insts. 131; 1 Th. Co. Lit. 561, note (13) and (G), 565, note (L); 1 Bright, Husb. and Wife, 133; Paine's Case, 8 Co. 34a, 1 Leon. 167; Hay v. Mayer, 8 Watts (Pa.) 203, 34 Am. Dec. 453; Holden v. Wells, 18 R. I. 802, 31 Atl. 265; Tomlinson v. Nickell, 24 W. Va. 148.

⁸¹ Ante, § 157.

⁸² See 2 Min. Insts. 130; 1 Washburn, Real Prop. 177, 178; 1 Roper, Husb. and Wife, 37 et seq.; 4 Kent, Com. 49.

coverture of an estate of inheritance (still existing) such as that the issue of the marriage may inherit it as A.'s heirs, and has had issue born alive during the coverture. All the requisites for curtesy exist here, and the husband would take it accordingly.

But if, after the wife's death, B. and the heirs of his body should cease to exist, the husband's curtesy (and in a corresponding case, the wife's dower) ceases to exist also.⁸³

Supposing, however, in the same case, that B., in the lifetime of A., should die without heirs of his body, whereupon A.'s estate ceases to exist, and A. afterwards dies, A.'s husband would be denied curtesy (or A.'s wife, in a corresponding case, dower); for though A.'s estate would thus come to an end by the regular efflux of the period marked out for it, without impairing A.'s previous seisin, curtesy or dower could not be a "prolongation" of A.'s estate, because there is no estate in A. at his or her death to which the curtesy or dower could be annexed as a continuation thereof.⁸⁴

§ 232. Same—Consort's Inheritance Terminated by Condition Subsequent. Suppose a conveyance "to W. and her heirs, but if she die under twenty-five her estate to cease and determine." Suppose, further, that W. marries, has issue and dies under twenty-five.

The reader must here take note of an explanation, elaborated hereafter, namely, that in case of a freehold estate given upon an express condition subsequent the seisin does not terminate merely upon the happening of the contingency, but only upon the re-entry of the grantor or his heirs for the condition broken; and when the grantor does so re-enter, he enters by title paramount, defeating or impairing the grantee's seisin from the beginning, the grantor being thereupon seised as he was before the grant, or as if there had never been any grant.⁸⁵

Applying these principles, it will be seen that the mere death of W. under twenty-five does not, of itself, put an end to her estate, and until the re-entry of the grantor or his heirs her husband may

⁸³ See 1 Scribner, Dower, 292 et seq., 297; Seymour's Case, 10 Co. 96a. In that case a tenant in tail, with remainder over, conveyed in fee simple to Seymour by bargain and sale (an innocent conveyance under the statute of uses), which did not operate a discontinuance of the entail, but permitted the issue in tail or the remainderman to enter after the death of the tenant in tail. See ante, § 174, note 25. The court held that Seymour's wife was entitled to dower in the fee simple thus conveyed, but that her dower was determinable by the death of the tenant in tail.

⁸⁴ This is probably the case which the text-writers have in mind when they lay down the rule unqualifiedly that curtesy and dower cannot be had in fees qualified. See 2 Min. Insts. 130; 1 Scribner, Dower, 197; Park, Dower, 162; 1 Tiffany, Real Prop. § 183.

⁸⁵ Post, § 474.

enter upon the land and enjoy curtesy therein.⁸⁶ But immediately upon such re-entry by the grantor or his heirs, the wife's previous seisin is impaired or defeated ab initio, and the husband's claim of curtesy falls to the ground, since it cannot lawfully be based upon an unlawful seisin on the part of the wife.⁸⁷

In the case above supposed the condition is one necessarily involving the consort's death (under the age of twenty-five). If we now suppose a conveyance "to W. and her heirs, but if B. dies under twenty-five W.'s estate to cease and determine" (or upon any other condition not involving W.'s death) precisely the same principles apply, together with others already noticed. Thus, if W. die, living B. (still under the age of twenty-five), W.'s husband takes curtesy; but his estate is liable to be defeated by the grantor's re-entry, should B. afterwards die under twenty-five. On the other hand, should B. die under twenty-five in W.'s lifetime, her estate terminates upon the grantor's re-entry as before, and, upon her death subsequently, her husband would be denied curtesy, not only because the grantor's re-entry is by title paramount, and impairs or defeats W.'s previous seisin ab initio, but also because W. has no estate at her death to which the curtesy might be annexed by law as a prolongation or continuation thereof.⁸⁸

§ 233. Same—Consort's Inheritance a Conditional Limitation.

A conditional limitation, it must be observed, differs in practical effect from an estate upon condition subsequent, in that the former estate, upon the breach of a condition subsequent, goes over to a third person, and does not revert to the grantor or his heirs by re-entry. Thus, upon a conveyance or devise "to W. and her heirs, but if W. die under twenty-five then her estate to cease and determine," is an estate upon condition subsequent, as shown in the preceding section. But a conveyance or devise "to W. and her heirs, but if she die under twenty-five then to B. and his heirs," is a conditional limitation in W., which upon the happening of the named event requires no re-entry on the part of the grantor or his heirs

⁸⁶ Park, Dower, 150; 1 Scribner, Dower, 290, 297; 1 Tiffany, Real Prop. § 183.

⁸⁷ Ante, § 219; 2 Min. Insts. 131; 1 Scribner, Dower, 291; Park, Dower, 153; 4 Kent, Com. 49; Emerson v. Harris, 6 Metc. (Mass.) 475.

⁸⁸ See 1 Washburn, Real Prop. 267; Park, Dower, 153; 1 Scribner, Dower, 291; Emerson v. Harris, 6 Metc. (Mass.) 475. In case of entry for breach of a condition implied, as where the consort has an estate tail, which is discontinued by reason of an alienation in fee by tortious conveyance, the consort's seisin is not impaired thereby, yet for the last reason given in the text there would be no curtesy. See 2 Min. Insts. 131, 132.

to terminate it, but goes over to B. of its own accord and immediately.⁸⁹

In case of such a conditional limitation as that above mentioned, should W. die under twenty-five, it will be seen that her husband (the other conditions existing) is entitled to curtesy as a prolongation of her estate annexed by law; for she has during the coverture an estate of inheritance, which is not terminated before her death, but runs out the regular period marked for it without impairing the previous seisin of W. Indeed, the authorities seem well agreed that in a case like this, where the consort's estate is a conditional limitation determinable upon a contingency necessarily involving the death of the consort, curtesy and dower are freely allowed.⁹⁰

If, however, the event upon which the consort's estate is to terminate is one not involving the consort's death, as in case of a devise "to W. and her heirs, but if B. returns from abroad then at once to B. and his heirs," "W. has an estate which may terminate in her lifetime and go over to B., in which case, should B. return during W.'s life, curtesy (or in a corresponding case, dower) could not be annexed by law as a "prolongation" or continuation of W.'s estate (though her estate comes to its regular expiration, without impairing her previous seisin), and hence curtesy (or dower) must be denied.⁹¹

Finally, should B. return from abroad after W.'s death, the curtesy (or dower) which has attached in the meanwhile, it would seem, continues to exist as a prolongation of the estate of the consort who has died seised; the previous seisin of the consort having been in no wise impaired by the passing of the estate to B. upon his return.⁹²

§ 234. Same—Destruction of Subject-Matter of Consort's Estate. If the subject-matter in which the consort's inheritance is to

⁸⁹ The theory of conditional limitations and the principles controlling them are fully discussed elsewhere. See post, §§ 480, 680, et seq.

⁹⁰ 2 Min. Insts. 132; 1 Washburn, Real Prop. 272 et seq.; 1 Atkinson, Convey. 258; *Buckworth v. Thirkell*, 3 Bos. & Pul. 652, note; *Moody v. King*, 2 Bing. 447; *Medley v. Medley*, 27 Grat. (Va.) 568; *Tomlinson v. Nickell*, 24 W. Va. 148; *Hatfield v. Sneden*, 54 N. Y. 285; *McMasters v. Negley*, 152 Pa. 303, 25 Atl. 641; *Hay v. Mayer*, 8 Watts (Pa.) 203, 34 Am. Dec. 453; *Evans v. Evans*, 9 Pa. 190; *Webb v. Trustees of First Baptist Church*, 90 Ky. 117, 13 S. W. 362; *Northcut v. Whipp*, 12 B. Mon. (Ky.) 65; *Daniel v. McManama*, 1 Bush (Ky.) 544; *Pollard v. Slaughter*, 92 N. C. 72, 53 Am. Rep. 402; *Milledge v. Lamar*, 4 Desaus. (S. C.) 617, 637. But see *Edwards v. Bibb*, 54 Ala. 475; 4 Kent, Com. 50; *Park, Dower*, 178 et seq.; 2 Sugden, Powers, 31; 3 Preston, Abst. Tit. 373.

⁹¹ See 1 Washburn, Real Prop. 180; 2 Min. Insts. 133.

⁹² Ante, § 231.

be enjoyed ceases altogether to exist, of course there can be no curtesy nor dower therein.⁹³

Thus, if the consort's property consists in a building or part of a building (without owning the land on which it rests), and the building is burned down and not rebuilt during the coverture, it is obvious that there is nothing left wherein curtesy or dower may be enjoyed.⁹⁴

So, where one makes a gift in tail, reserving a rent payable throughout the term, marries, has issue and dies in the lifetime of the tenant in tail, and then the tenant in tail dies without issue, the consort could have no curtesy nor dower in the rent because it has ceased to exist with the estate tail for which it was the compensation; nor in the land because the donor in tail was never seised of that during the coverture. But if the donor were still living when the donee in tail dies without issue, the land would revert to the donor during the coverture, and curtesy or dower would be allowed therein.⁹⁵

⁹³ 2 Min. Insts. 133, 155.

⁹⁴As to the right of tenant by the curtesy or in dower to the insurance money, supposing the house insured, see ante, § 202.

⁹⁵ 2 Min. Insts. 133, 155; 1 Th. Co. Lit. 561; 1 Bright, Husb. and Wife, 132.

CHAPTER XIII.

LIFE ESTATE IN DOWER.

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§ 235. **Points of Difference between Dower and Curtesy.** In the main the principles regulating dower are closely analogous to those regulating curtesy, and hence much that has been said in the preceding chapter touching curtesy must be here repeated, though perhaps in somewhat different form or connection. On the other hand, some of the principles appearing in the following sections for the first time might equally have been applied to curtesy.

There are, however, certain essential differences between the two estates, and a principle applicable to dower, in some respect wherein it differs from curtesy may not be applicable to the latter.

The differences between these two analogous estates depend mainly upon either (1) differences in the requisites of the two estates; or (2) in the quantity of land to which the estate attaches; or (3) in the sex and condition of the persons to whom the rights respectively accrue.

So far as the requisites are concerned, the dower interest differs from that by the curtesy in that (1) dower is permitted in estates of inheritance whereof the husband is seised in law as well as in fact;¹ and (2) in not requiring that there should be any issue born of the marriage.²

In respect to the quantity of land passing to the tenant by the curtesy and the tenant in dower, respectively, while the tenant by the curtesy obtains the whole of his wife's lands of inheritance upon her death,³ the tenant in dower is entitled to an undivided one-third of the husband's lands of inheritance, which undivided portion is converted into an interest in severalty only by the assignment of her dower to the widow by him who has the inheritance, or freehold, or by order of court.⁴ This assignment of dower, which

¹ Post, § 241. For the requisite of seisin for curtesy, see ante, § 210 et seq.

² Post, § 254; 2 Min. Insts. 183. For curtesy issue must be born alive during the coverture. Ante, § 226 et seq.

³ Ante, § 208.

⁴ Post, §§ 306, 310, 311; 2 Min. Insts. 183.

is entirely unnecessary in the case of curtesy, since the husband is entitled to the whole of the wife's lands, gives rise to many questions in relation to dower which do not appear at all in the case of curtesy.

In respect to the sex and condition of the tenants, respectively, important differences between the two estates arise by reason of the fact that the tenant by the curtesy is the husband, who is generally *sui juris* during the coverture, and not dependent upon, nor usually obtaining, support from his wife, while the tenant in dower is the wife, under disability at common law throughout the coverture while the dower is inchoate or contingent, and after her husband's death in general dependent upon the means of support and the provision he has left her. These conditions constitute a very essential difference between the two, the fruits of which appear in too many different ways to be here enumerated, but which will unfold themselves to the thoughtful student as he reads the discussion to follow, and compares the dower rights and obligations of the wife with the curtesy rights and obligations of the husband.

§ 236. Several Species of Dower at Common Law—Enumeration. The older writers enumerate several species of dower, namely: (1) Dower *ad ostium ecclesiæ*; (2) dower *ex assensu patris*; (3) dower *de la plus belle*; (4) dower by the custom of particular places; and (5) dower at common law, or more properly, common dower.⁵

Of these, the last is the only one recognized in this country, and is the one which constitutes the subject for discussion in this chapter.

As the other kinds of dower have only a historical interest in this country, the student who is interested in the subject must be referred to an older work for information.⁶

§ 237. Definition of Dower at Common Law. Dower at common law is defined as follows:

Where a woman marries a man lawfully seised at any time during the coverture of an estate of inheritance, such as that the issue of the marriage (if any) may by possibility inherit it as heirs to the husband, and the husband dies, the wife, surviving, as tenant in dower, is entitled to have one-third thereof assigned her for her life as a prolongation of the husband's estate annexed by law.⁷

It will be observed that the definition of dower at common law differs from that of curtesy before given⁷ in that (1) the common

⁵ 2 Min. Insts. 155, 156; 2 Bl. Com. 132 et seq.

⁶ 2 Min. Insts. 134, 153; 1 Th. Co. Lit. 569, 578.

⁷ Ante, § 208.

law does not permit dower in equitable inheritances, while it does permit curtesy therein;⁸ (2) no issue need be born of the marriage in order that the wife may take dower, while for curtesy the birth of issue alive during the coverture is essential;⁹ (3) the wife as tenant in dower takes only one-third of the deceased husband's lands, which being undivided necessitates an assignment of her particular third, while the tenant by the curtesy takes the whole, and therefore needs no assignment to identify the land to which he is entitled;¹⁰ and (4) the tenant in dower is the widow, while the tenant by the curtesy is the husband.

§ 238. **Origin and Design of Dower.** Dower seems to have originated among the Germans. The feudists recognized it in the maxim, "*Non uxor marito, sed uxori maritus affert.*" The usage was for the husband and oldest son to go to war, whilst the wife and other children tilled the soil and raised provisions for the soldiers. Hence, as she had the third part in toil, upon her husband's death she was allowed a third part of the feud for her life for the maintenance of herself and the younger children. The Saxons appear to have first introduced it into England, and the Normans to have regulated it according to the usages of Normandy.¹¹

Though originally designed for the sustenance of the widow and the nurture and education of the younger children, the latter object is in modern times merged in the former, and she is under no legal obligation to employ her dower for the latter purpose.¹² It is also in modern times regarded as a means of equalizing the marital rights of the husband and wife, respectively, in the property of the other.¹³

§ 239. **Requisites of Dower—Enumeration.** The requisites of dower may be enumerated as follows: (1) The marriage; (2) the seisin of the husband; (3) the husband's estate of inheritance; (4) the death of the husband; and (5) the prolongation or continuation of the husband's estate.

§ 240. **I. The Marriage.** The same principles apply here as in the case of curtesy.¹⁴ It suffices to repeat that if the marriage is void per se, or, where voidable only, if it be avoided in the lifetime of both parties, or if the marriage status be dissolved by a divorce

⁸ Ante, § 223; post, § 257 et seq. The reasons for this difference will appear hereafter. See post, § 257.

⁹ Ante, § 226 et seq.

¹⁰ 2 Min. Insts. 183.

¹¹ 2 Min. Insts. 135; Bac. Abr. Dower; 1 Th. Co. Lit. 567, note (A).

¹² 2 Min. Insts. 135; 2 Bl. Com. 129, 130; 1 Th. Co. Lit. 567, note (1);

1 Scribner, Dower, 23 et seq.; Fuller v. Conrad, 94 Va. 233, 26 S. E. 575.

¹³ 2 Min. Insts. 135.

¹⁴ Ante, § 211.

a vinculo, no dower is allowed; the maxim of the common law being, "Ubi nullum matrimonium, ibi nulla dos."¹⁵

§ 241. II. The Husband's Seisin—1. Seisin in Fact or in Law. While curtesy, as has been shown,¹⁶ requires seisin in fact (actual or constructive) on the wife's part at some time during the coverture, seisin in law being sufficient only where a seisin in fact is impossible, the requirement for dower is less rigorous. For dower the husband must at common law be seised at some time during the coverture; but his seisin may be either in fact or in law. Seisin in fact is dispensed with for dower, because "it lieth not in the power of the wife to bring the husband's land to an actual seisin, as the husband may do of the wife's land."¹⁷

As in curtesy, the seisin need not continue during the whole coverture. It is enough if it exists beneficially in the husband for ever so short a period during the coverture. The husband's alienation after marriage, without the wife's assent, or his disseisin by a wrongdoer (unless for a period prior to the husband's death which bars his title by the statute of limitations), will not affect the wife's claim.¹⁸

§ 242. Same—2. Husband's Seisin Unlawful. As in the case of curtesy, in order that dower may attach, the husband's seisin must be lawful so far as relates to the persons against whom the widow is claiming dower. But the unlawfulness of the husband's seisin defeats the dower only as to those persons who possess a better right to the land than the husband does. Strangers cannot take advantage thereof; but as against those having a superior title, neither the husband nor the successor to his title—that is, the dowress—can set up an inferior title.¹⁹

Thus, if the deed to the husband is void as to third persons because unrecorded, or made with intent to defraud creditors, etc., while the wife would be denied dower as against such third persons, she is entitled thereto as against all others as to whom the husband's seisin is valid and binding.²⁰

¹⁵ Ante, § 211 et seq.; 2 Min. Insts. 135 et seq.; 1 Th. Co. Lit. 557, note (B), 561, 571, note (C); 1 Washburn, Real Prop. 221, 254; Harris v. Harris, 31 Grat. (Va.) 33, 34; Van Cleef v. Burns, 118 N. Y. 549, 23 N. E. 881, 16 Am. St. Rep. 782; Carr v. Carr, 92 Ky. 552, 18 S. W. 453, 36 Am. St. Rep. 614. See 1 Scribner, Dower, c. 6 et seq. The validity of a foreign marriage is usually controlled by the *lex celebrationis* of the marriage. Minor, Conf. Laws, §§ 73, 77, 78; 1 Washburn, Real Prop. 222, 223; 1 Scribner, Dower, 147.

¹⁶ Ante, § 214.

¹⁷ 1 Th. Co. Lit. 574; 2 Min. Insts. 138, 139; 1 Scribner, Dower, 263; ante, § 214.

¹⁸ 2 Min. Insts. 139; 1 Th. Co. Lit. 568, note (B), 609.

¹⁹ Washburn, Real Prop. 227, 228.

²⁰ Emerson v. Harris, 6 Metc. (Mass.) 475.

So the widow of a disseisor is entitled to dower in the lands of which her husband has been illegally seised during the coverture, except as against him who is rightfully entitled to the seisin.²¹ Hence a recovery of the land from the husband in an action of ejectment (which determines the plaintiff's title to be better than that of the husband) bars the wife's dower.²² This, however, is subject to the qualification that if the recovery is obtained from the husband by his collusion, with a view to defeat the wife's dower, his fraud shall be unsuccessful. A collusive recovery of this kind does not bar the wife's dower.²³

But it was much questioned at common law whether a recovery against the husband by mere default, without evidence of his concurrence in a design to defeat his wife's dower, would not operate as a bar thereto. Indeed, the better opinion seems to be that at common law such a recovery does bar dower.²⁴ Hence by statute Westm. II, 13 Edw. I, c. 4, it was provided in England that the widow shall have her dower notwithstanding such recovery by default against the husband.²⁵

§ 243. Same—3. Husband's Right of Entry or Action. If the husband is not only not himself seised of the land at any time during the coverture, but if through that entire period some one else is in adverse possession of the land, he has during the coverture only a right of entry upon the land or of action therefor.²⁶ In this, at common law, the wife has no dower, as in a corresponding case the husband would have no curtesy,²⁷ because at no time during the coverture is the consort seised of the land, as the definitions of both estates require.²⁸ But it is otherwise if, during the coverture, the husband reduces his right of entry or action into possession, or if he is disseised after the marriage occurs.²⁹

§ 244. Same—4. Husband's Seisin Beneficial. The mere fact that the husband is seised of the inheritance during the coverture does not suffice for dower, unless that seisin be for the husband's

²¹ 1 Washburn, Real Prop. 228.

²² 1 Th. Co. Lit. 618, note (R, 1); 1 Bright, Husb. and Wife, 350.

²³ 2 Min. Insts. 165.

²⁴ 2 Min. Insts. 165; Bac. Abr. Dower (F).

²⁵ 2 Min. Insts. 165.

²⁶ Ante, §§ 131, 214, 216.

²⁷ Ante, § 216.

²⁸ 2 Min. Insts. 141; 1 Scribner, Dower, 255 et seq.; Small v. Proctor, 15 Mass. 495; Thompson v. Thompson, 46 N. C. 431.

²⁹ 1 Washburn, Real Prop. 225. But a mere judgment in favor of the husband for the land is not sufficient. The husband must have been actually put in possession of the land during the coverture. 1 Scribner, Dower, 257.

own use and benefit. While the mere use and benefit in the husband, standing alone (that is, the equitable estate alone), did not at common law confer dower upon the wife,³⁰ on the other hand it is equally well settled that the naked legal title in the husband during the coverture, the beneficial ownership being in another, gives the wife no right to dower. At least a court of equity will enjoin the widow from setting up a claim to dower founded upon such a seisin.³¹ Thus the widow of a trustee or mortgagee is not entitled to dower in the land given in trust or mortgaged; the husband not being beneficially seised of the land.³²

This principle is applicable not only to express trusts, but to resulting, implied or constructive trusts also. Hence, if the land of which the husband is seised was paid for by the funds of another (which would create an implied trust in the husband for the benefit of him who advanced the consideration),³³ the widow receives no dower.³⁴ So, also, if the husband secures a conveyance of land to himself by fraudulent misrepresentations under circumstances entitling the grantor to hold the fraudulent grantee as a constructive trustee, and he does hold him accordingly, there is no dower on the part of such grantee's widow, though it is otherwise, if the defrauded grantor elects to confirm the transaction.³⁵

It follows from these principles that, where a trustee in a deed of trust to secure debts executes a deed of release, it is not necessary that his wife should unite in such release, since the wife of a mere trustee is not entitled to dower.³⁶

Another prominent illustration of the same principle is to be found in cases where the husband before marriage contracts to convey land, but never actually conveys the legal title, or, if he does so after his marriage, fails to unite his wife with him in the deed. In such cases the wife is not entitled to dower, for in equity (the court regarding that as done which ought to be, or is agreed to be, done³⁷) the husband is during the coverture a mere trustee of the land for his vendee, holding only the bare legal title.³⁸ And

³⁰ Post, § 257 et seq.; ante, § 224.

³¹ 2 Min. Insts. 147; 4 Kent. Com. 43; *Hinton v. Hinton*, 2 Ves. Sr. 634.

³² 2 Min. Insts. 147; 2 Bl. Com. 137, note (30); 1 Th. Co. Lit. 576, note (25).

³³ Post, § 421 et seq.

³⁴ *Thompson v. Perry*, 2 Hill, Eq. (S. C.) 204, 29 Am. Dec. 68.

³⁵ See *McNish v. Pope*, 8 Rich. Eq. (S. C.) 112.

³⁶ 2 Min. Insts. 147; 2 Bl. Com. 137, note (30).

³⁷ Ante, § 18; post, § 420.

³⁸ 2 Min. Insts. 147; *Burdine v. Burdine*, 98 Va. 515, 523. 36 S. E. 992, 81 Am. St. Rep. 741; *Oldham v. Sale*, 1 B. Mon. (Ky.) 77; *Firestone v. Firestone*, 2 Ohio St. 415. This applies as well to contracts to devise as to con-

it appears to be immaterial whether or not the vendee be in default in the payment of the purchase money throughout the vendor's coverture; his mere default not giving the vendor the right to re-enter and take possession until the vendee has had reasonable notice and an opportunity to amend his fault.³⁹

§ 245. Same—5. Husband's Seisin Transitory or Momentary.

In order to dower, the law requires that the husband should be beneficially seised at some time during the coverture, but the period and duration of the enjoyment of such seisin is immaterial.⁴⁰ Thus, where a father, seised of land, and his son were hanged from the same cart, the son being observed to struggle a little longer, the father's land was held to have descended upon the son for the brief span of his existence after the father's death, and the son's widow was therefore dowable.⁴¹

The same principle applies in the case of liens placed upon the land by the husband immediately after acquiring the property, provided the acquisition of the property and the subsequent lien are independent transactions. But if the purpose of the subsequent lien is merely to secure the payment of the purchase money by the husband, in pursuance of a prior understanding between the parties that such lien should be given, the execution of the mortgage, deed of trust, etc., though in fact subsequent to the conveyance to the husband, is in contemplation of law contemporaneous therewith, so that the intermediate seisin of the husband is not to be regarded as for his benefit. In such case, even though the husband die without executing the lien agreed upon, his wife is denied dower, and hence it is unnecessary that she should unite in such mortgage or deed of trust when it is executed.⁴²

vey land. *Burdine v. Burdine*, supra. In *Gaines v. Gaines*, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425, 428, it was held that the same principle is applicable where the husband had before marriage made a bona fide gift to a child of a former marriage who took possession and improved the land, claiming it as his own, before the coverture.

³⁹ *Chapman v. Chapman*, 92 Va. 537, 539, 24 S. E. 225, 53 Am. St. Rep. 823.

⁴⁰ 2 Min. Insts. 139, 146; 1 Th. Co. Lit. 576, notes (G), (H); 2 Bl. Com. 131; 1 Washburn, Real Prop. 228; Bac. Abr. Dower (c, 2); *McCauley v. Grimes*, 2 Gill & J. (Md.) 318, 20 Am. Dec. 434; *McClure v. Harris*, 12 B. Mon. (Ky.) 261; *Douglass v. Dickson*, 11 Rich. L. (S. C.) 417; *Wheatley v. Calhoun*, 12 Leigh (Va.) 274, 37 Am. Dec. 654.

⁴¹ *Broughton v. Randall*, 2 Cro. (Eliz.) 503; 2 Min. Insts. 146; 2 Bl. Com. 132; 1 Washburn, Real Prop. 228.

⁴² 2 Min. Insts. 146; 1 Washburn, Real Prop. 229 et seq.; *Mayburry v. Brien*, 15 Pet. 21, 39, 10 L. Ed. 646; *Wheatley v. Calhoun*, 12 Leigh (Va.) 274, 37 Am. Dec. 654; *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Clark v.*

Thus, in *McCauley v. Grimes*,⁴³ for the purpose of dividing certain land amongst a number of heirs, the land was conveyed to H., who executed bonds to the several heirs for the payment of their shares, securing the bonds by a mortgage upon the land; H.'s wife not uniting in the mortgage. It was held that she was only entitled to dower therein subject to the mortgage.

The same principle is to be applied where a conveyance is made to the husband with a vendor's lien to secure the purchase price, whether such vendor's lien be expressly reserved in the conveyance or implied by law (where the implied vendor's lien has not been abolished).⁴⁴ In such case the vendee's widow is denied dower in the land conveyed because, quoad the vendor's lien, the vendee is not beneficially seised.⁴⁵

But it must not be overlooked that if the lien be created in pursuance of an after arrangement, not in the contemplation of the parties when the land was acquired, the husband's seisin, however brief, is beneficial, and the wife takes dower, unless she has united with the husband in the execution of the mortgage or deed of trust.⁴⁶

§ 246. Same—6. Sole Seisin of Husband. If the husband be a joint tenant, the common-law doctrine is that upon his death the land goes to the surviving tenants; those claiming under him by title arising subsequent to his death, such as his heirs, his devisees and his widow, being cut out, unless he survives all the other tenants, or unless the joint tenancy is destroyed before his death.⁴⁷

But a widow may be endowed, even at common law, of the lands held by her husband as tenant in common or in coparcenary; no right of survivorship being recognized in these cases.⁴⁸

In such cases the dower must be assigned to the widow, to be held (as the husband himself was seised) undividedly with the co-tenants; the widow becoming herself a co-tenant with them. But any of the co-tenants, including the dowress, though she is only

Munroe, 14 Mass. 351; *Stow v. Tiff*, 15 Johns. (N. Y.) 458, 8 Am. Dec. 266; *McCauley v. Grimes*, 2 Gill & J. (Md.) 318, 324, 20 Am. Dec. 434.

⁴³ 2 Gill & J. (Md.) 318, 20 Am. Dec. 434.

⁴⁴ See 2 Washburn, Real Prop. (6th Ed.) § 1028, for the statutes in the various states on the subject of the vendor's lien.

⁴⁵ 2 Min. Insts. 146; *Culbertson v. Stevens*, 82 Va. 406, 4 S. E. 607; *Patton v. Stewart*, 19 Ind. 233; *Warner v. Van Alstyne*, 3 Paige (N. Y.) 513.

⁴⁶ 2 Min. Insts. 146; 1 Washburn, Real Prop. 233; *Blair v. Thompson*, 11 Grat. (Va.) 441; *Gage v. Ward*, 25 Me. 101.

⁴⁷ Post, § 732; 2 Min. Insts. 139; *Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646.

⁴⁸ 2 Min. Insts. 139; 1 Washburn, Real Prop. 208.

tenant for life, may then demand a partition, so as to hold in severalty.⁴⁹

If the husband be a co-tenant, and upon a partition suit a decree be made in his lifetime for the sale of the land for purposes of partition, there is a difference of opinion as to whether the wife, not having been made a party to the suit, is divested of her dower by the decree and sale as against the purchaser at the sale. The better view, even independently of statute, is that her dower rights are divested.⁵⁰

§ 247. **Same—7. Seisin of Husband as Partner in Trade.** We have seen elsewhere⁵¹ that land held by a partnership, if purchased with partnership funds and for partnership purposes, is according to the better opinion to be regarded in equity as converted out and out into personalty, not only for the purpose of paying the partnership debts, as some of the authorities hold,⁵² but for all purposes, as between the members of the firm or as between the surviving partners and the representatives of the deceased.⁵³ Under the latter view it is apparent that the widow of a deceased partner must be denied dower altogether in such case, even in the surplus left after paying all the partnership debts.⁵⁴

§ 248. **III. The Husband's Inheritance.** Under this head we shall consider the following points: (1) The general requirement that the husband must be seised of an estate of inheritance during the coverture; (2) the doctrine of "Dos de dote peti non debet"; (3)

⁴⁹ 2 Min. Insts. 159; 1 Th. Co. Lit. 593, note (C, 1); *Parrish v. Parrish*, 88 Va. 529, 14 S. E. 325.

⁵⁰ 2 Min. Insts. 139; 1 Washburn, Real Prop. 208; *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355; *Warren v. Twilley*, 10 Md. 39. See *Coles v. Coles*, 15 Johns. (N. Y.) 322. Even in case of a voluntary partition in which the husband unites, the better opinion seems to be that the partition, if fair and just to her, cuts off the wife's dower in the lands allotted to the husband's co-tenants, though she do not assent thereto. See *Lee v. Lindell*, supra; *Mosher v. Mosher*, 32 Me. 414.

⁵¹ Ante, § 19.

⁵² 1 Washburn, Real Prop. 209; *Howard v. Priest*, 5 Metc. (Mass.) 582; *Goodburn v. Stevens*, 1 Md. Ch. 437, 5 Gill, 1; *Markham v. Merrett*, 7 How. (Miss.) 437, 40 Am. Dec. 76; *Willet v. Brown*, 65 Mo. 138, 27 Am. Rep. 265.

⁵³ Ante, § 19; 2 Min. Insts. 140; *Phillips v. Phillips*, 1 My. & K. 649; *Randall v. Randall*, 7 Sim. 271; *Brooke v. Washington*, 8 Grat. (Va.) 255, 56 Am. Dec. 142; *Buck v. Winn*, 11 B. Mon. (Ky.) 326; *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631; *Andrews v. Brown*, 21 Ala. 437, 56 Am. Dec. 252; *Sigourney v. Munn*, 7 Conn. 11. But see *Davis v. Christian*, 15 Grat. (Va.) 36.

⁵⁴ 2 Min. Insts. 140; *Parrish v. Parrish*, 88 Va. 529, 532, 14 S. E. 325; *Sumner v. Hampson*, 8 Ohio, 328, 32 Am. Dec. 722; *Dubring v. Dubring*, 20 Mo. 174. Under the other view the partner's widow is entitled to dower in the surplus: See 1 Washburn, Real Prop. 209.

the effect of the interpolation of a vested freehold estate between the immediate freehold in possession and the first estate of inheritance; (4) the effect of the similar interpolation of a contingent freehold estate; and (5) the husband's estate of inheritance must be such as that the issue of the marriage (if any) may inherit it as heirs to the husband.

§ 249. **Same—1. Husband must be Seised during Coverture of an Estate of Inheritance.** In accordance with the terms of the definition of dower it is essential that the husband shall at some time during the coverture be seised of an estate of inheritance, such as that the issue of the marriage (if any) may inherit it as heirs to the husband.⁵⁵

Hence it is not sufficient that the husband throughout the coverture is merely entitled to the inheritance by way of reversion or remainder after a freehold estate in another, for the requirement that he be "seised" of the inheritance implies that the husband must have the actual possession and enjoyment thereof, which is inconsistent with the seisin of a freehold estate in another lasting throughout the coverture.⁵⁶ But if the estate preceding the husband's reversion or remainder be only a term for years, though it actually last throughout the coverture, the seisin of the inheritance is in the husband all the time. The existence of such a term for years presents no obstacle to the wife's dower.⁵⁷

On the other hand, the husband's seisin of a mere life estate throughout the coverture is not sufficient for dower. He must be seised of the inheritance itself at some time during the coverture.⁵⁸

But if the husband unites both of these conditions in himself, and has at some time during the coverture both the immediate seisin of the freehold and the inheritance by way of reversion or remainder, the estate of inheritance merges the lesser freehold, and the husband is thereafter directly seised of the inheritance itself, un-

⁵⁵ Ante, § 237.

⁵⁶ 2 Min. Insts. 150; *Cocke v. Philips*, 12 Leigh (Va.) 248; *Safford v. Safford*, 7 Paige (N. Y.) 259, 32 Am. Dec. 633; *Wilmarth v. Bridges*, 113 Mass. 407; *Houston v. Smith*, 88 N. C. 312; *Young v. Morehead*, 94 Ky. 608, 23 S. W. 511; *Gardner v. Greene*, 5 R. I. 104; *Durando v. Durando*, 23 N. Y. 331.

⁵⁷ 1 Scribner, Dower, 230; Co. Lit. 32a; *Boyd v. Hunter*, 44 Ala. 705; *Weir v. Tate*, 39 N. C. 264; *Sykes v. Sykes*, 49 Miss. 190.

⁵⁸ 2 Min. Insts. 150; *Gillis v. Brown*, 5 Cow. (N. Y.) 388; *Thompson v. Vance*, 1 Metc. (Ky.) 669; *Trumbull v. Trumbull*, 149 Mass. 200, 21 N. E. 366, 4 L. R. A. 117; *Kenyon v. Kenyon*, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787; *Fisher v. Grimes*, *Smedes & M. Ch. (Miss.)* 107. Thus, where the husband is seised of an estate pur autre vie and dies before cestui que vie, the wife is denied dower. *Gillis v. Brown*, supra; *Fisher v. Grimes*, supra.

less such merger is prevented by the fact that a freehold estate in another intervenes between the immediate freehold in possession and the first estate of inheritance.⁵⁹ The effect of such intervention of a freehold estate will be considered more fully hereafter.⁶⁰

To illustrate these principles:

(1) If a man leases land to another for life, reserving a rent throughout the term, then marries, and dies before the lease has expired, his widow is denied dower in the land, because the husband at no time during the coverture has the immediate freehold thereof in possession, but only the reversion after a freehold in another; nor could she take dower in the rent, because in that the husband has only an estate corresponding to that of the lessee in the land (that is, an estate for life).⁶¹ On the other hand, should the man lease only for a term of years, then marry, and die before the term has expired, the wife is dowable, for the husband has never parted with the freehold or with the inheritance. She does not, indeed, oust the tenant for years, whose claim is paramount to hers; but she is dowable in the reversion of which the husband is seised during the coverture, and as the owner of one-third of the reversion for her life she has one-third of the rent, which follows the reversion.⁶²

(2) If a conveyance be made "to A. for ten years, remainder to B. and his heirs," though B. die before A.'s ten-year term has expired, his widow is to be endowed, for B. is seised of the inheritance during the coverture; A.'s possession of the term for years not interfering with B.'s seisin.⁶³ But if the conveyance be "to A. for life, remainder to B. and his heirs," if B. dies first, B.'s widow is not entitled to dower, because at no time during B.'s coverture has

⁵⁹ 2 Min. Insts. 150; 1 Th. Co. Lit. 560, notes (E), (F), 582, note (M); Park. Dower, 57; 1 Scribner, Dower, 230, 235, et seq.; 4 Kent, Com. 40; Eldredge v. Forrestal, 7 Mass. 253; Moore v. Esty, 5 N. H. 479. See House v. Jackson, 50 N. Y. 161.

⁶⁰ Post, §§ 252, 253.

⁶¹ 2 Min. Insts. 151; 1 Th. Co. Lit. 559, 560, note (10), 582, 583; Blow v. Maynard, 2 Leigh (Va.) 30, 56; Houston v. Smith, 88 N. C. 312. If the lease were in fee, then the husband would be seised of the rent in fee during the coverture, and the widow would take dower therein. But if in the latter case the grantor of the land, before marriage, should buy back an estate in the land for his own life (whereby the whole rent is suspended during his lifetime), and then marries and dies, his widow could not be endowed either of the rent or of the land. 2 Min. Insts. 151; 1 Th. Co. Lit. 560.

⁶² 2 Min. Insts. 151; 1 Th. Co. Lit. 559, 560, note (10), 582, note (40); Stoughton v. Leigh, 1 Taunt. 410; Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 278; Weir v. Tate, 39 N. C. 264.

⁶³ 1 Washburn, Real Prop. 204, 205; Bates v. Bates, 1, Ld. Raym. 326; Hitchens v. Hitchens, 2 Vern. 403.

B. the immediate freehold in possession (or the seisin), but only a remainder in fee simple after a freehold estate in another.⁶⁴ If, however, A. should die before B., while A.'s widow would not be dowable, because A. has not the inheritance, his death gives B. the immediate seisin of his estate of inheritance, and upon B.'s death B.'s widow is dowable.⁶⁵

(3) Again, in the example, last given ("to A. for life, remainder to B. and his heirs"), if during the lifetime of both parties either should buy up the other's estate, so as to give to the same party both the immediate freehold in possession and the first estate of inheritance, without an intervening freehold estate, the inheritance merges or extinguishes the lesser freehold, and thenceforth the party is immediately seised of the inheritance itself, and his wife is dowable, whether A. or B. dies first.⁶⁶

§ 250. Same—2. Doctrine of "Dos de Dote, Peti Non Debet." It is an established principle of the law of dower that the widow's title dates from the moment of her husband's death, and though it be not assigned in specific land until later, yet when it is assigned the title thereto dates by relation from the husband's death, not from the time of assignment. The dower is a mere continuation of the husband's estate, cutting off any intermediate seisin in any one else.⁶⁷

Thus, if we suppose the husband to have derived his lands by devise or descent from his father, he must endow his father's widow, and thereupon her seisin, being a continuation of her husband's, defeats the seisin of the devisee or heir as to the one-third so assigned her, as from the date of the father's death. Hence, should the son die in the lifetime of the dowress, himself leaving a widow, the junior widow is dowable only of one-third of the remaining two-thirds of the land, for of the one-third already assigned the senior widow as her dower the junior husband has never in contemplation of law been seised during the coverture; such seisin as he obtained by devise or descent having been defeated, as of the time of his father's death and the beginning of his own title, by his subsequent assignment of dower to the senior widow. This is the

⁶⁴ 1 Washburn, Real Prop. 204; *Cocke v. Philips*, 12 Leigh (Va.) 248; *Brooks v. Everett*, 13 Allen (Mass.) 457; *Durando v. Durando*, 23 N. Y. 331; *Arnold v. Arnold*, 8 B. Mon. (Ky.) 202; *Shoemaker v. Walker*, 2 Serg. & R. (Pa.) 554.

⁶⁵ 1 Washburn, Real Prop. 204. See cases cited supra.

⁶⁶ See post, § 665 et seq.; ante, § 201.

⁶⁷ 2 Min. Insts. 152; 1 Th. Co. Lit. 574, 575, notes (E), (F); 1 Washburn, Real Prop. 268, 269.

doctrine expressed by the maxim, "Dos de dote, peti non debet"—that is, dower cannot be assigned out of dower.⁶⁸

If under like circumstances the heir or devisee dies before having assigned dower to the senior widow, the duty will then devolve upon his successor in the freehold to endow both widows. Should he endow the senior widow first, the same principles apply as before. Such assignment defeats the junior husband's seisin as to her one-third from the beginning, and as to that portion creates in the junior husband during the coverture only a reversion after a life estate in the senior widow. The junior widow is dowable, therefore, as before, only in the remaining two-thirds of the land.⁶⁹

In neither of these cases, it should be observed, is the junior widow's dower to be increased after the death of the senior widow (the junior husband being then dead), for of the senior widow's share the junior husband is seised at no time during the coverture.⁷⁰ But if in the last case above mentioned the tenant of the freehold endows the junior widow first, and afterwards the senior widow, the endowment of the latter, it seems, defeats the assignment to the junior widow pro tanto; but after the senior widow's death the junior, according to the weight of authority, if not of reason, is restored to her dower in the whole land.⁷¹

So far we have supposed the title of the junior husband to begin upon the death of the senior husband, under a claim by devise or descent. But if the junior husband takes the land from the senior in the latter's lifetime by conveyance, etc., a different result is obtained. In such case there is a period prior to the senior husband's death during which the junior husband is seised of the whole estate, which seisin is only defeated by the assignment of dower to the senior widow from the date of the senior husband's death, not from the date of the conveyance to the junior husband. Hence, while the senior widow is dowable of the whole land (sup-

⁶⁸ 2 Min. Insts. 152; 1 Th. Co. Lit. 574, 575, notes (E), (F); 1 Washburn, Real Prop. 269; Blow v. Maynard, 2 Leigh (Va.) 29; In re Cregier, 1 Barb. Ch. (N. Y.) 598, 45 Am. Dec. 416; Dunham v. Osborn, 1 Paige (N. Y.) 634; Safford v. Safford, 7 Paige, 259, 32 Am. Dec. 633; Durando v. Durando, 23 N. Y. 331; Eldredge v. Forrestal, 7 Mass. 253; Robinson v. Miller, 2 B. Mon. (Ky.) 284, 288.

⁶⁹ 2 Min. Insts. 153; 1 Washburn, Real Prop. 269; 1 Scribner, Dower, 326; In re Cregier, 1 Barb. Ch. (N. Y.) 598, 45 Am. Dec. 416; McLeery v. McLeery, 65 Me. 172, 20 Am. Rep. 683.

⁷⁰ Safford v. Safford, 7 Paige (N. Y.) 259, 32 Am. Dec. 633; Reynolds v. Reynolds, 5 Paige (N. Y.) 161.

⁷¹ 2 Min. Insts. 153; 1 Th. Co. Lit. 575, note (F); 1 Washburn, Real Prop. 269; 1 Scribner, Dower, 327; In re Cregier, 1 Barb. Ch. (N. Y.) 598, 45 Am. Dec. 416; Reitzel v. Eckard, 65 N. C. 673; Steele v. La Frambois, 68 Ill. 476.

posing her not to have united with her husband in the conveyance), the junior widow is also dowable of the whole; that is, she takes by way of dower one-third of the whole land, which, however, is to be assigned out of the two-thirds remaining after the assignment of dower to the senior widow.⁷²

This principle is applicable in all cases where a married man purchases land by conveyance inter vivos from another married man, whose wife does not unite with him in conveying the land to the former, and also to cases where the grantee, though not married at the time of the conveyance, marries before the death of the grantor.⁷³

§ 251. Same—Judgment for Dower on Behalf of Senior Widow Equivalent to Assignment Thereof. It is in general necessary to the operation of the maxim *Dos de dote* that the senior widow's dower be actually assigned her, for it is upon the assignment that her title relates back to her husband's death, defeating the seisin of his successor.⁷⁴ But an actual assignment of the dower is dispensed with if a court has rendered a judgment or decree for the senior widow's dower, though in fact she never takes possession of it.⁷⁵

Thus, in *Dunham v. Osborn*,⁷⁶ a bill was filed for the partition of certain lands subject to dower claims by the widows of successive owners. The court decreed that the senior widow was entitled to dower in the whole, but ordered that the land be sold and that she take her dower out of the proceeds, while allowing the junior

⁷² 2 Min. Insts. 153; 1 Th. Co. Lit. 574, 575, notes (E), (F); *Bustard's Case*, 4 Co. 122; *Leavitt v. Lamprey*, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; *Reynolds v. Reynolds*, 5 Paige (N. Y.) 161; *Dunham v. Osborn*, 1 Paige (N. Y.) 634; *Durando v. Durando*, 23 N. Y. 331; *Reitzel v. Eckard*, 65 N. C. 673; *Manning v. Laboree*, 33 Me. 343. But see 1 Washburn, Real Prop. 269 et seq., where the view is taken that the junior widow takes dower in the whole, but subject to the dower of the senior widow; that is, she is to take at first only one-third of the remaining two-thirds, to be increased after the senior widow's death to one-third of the whole, upon the theory that, while the junior husband's seisin is not defeated by the assignment of dower to the senior widow, it is interrupted during her lifetime.

⁷³ 1 Washburn, Real Prop. 270. It is otherwise if the grantee acquires the land after the senior husband's death, as by a conveyance from his executors. The doctrine, *Dos de dote*, applies in full force, as if the junior husband had taken by devise or descent. *Fisher v. Grimes*, 1 Smedes & M. Ch. (Miss.) 107.

⁷⁴ Ante, § 250.

⁷⁵ *Leavitt v. Lamprey*, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; *Atwood v. Atwood*, 22 Pick. 283; *Dunham v. Osborn*, 1 Paige (N. Y.) 634; *Reynolds v. Reynolds*, 5 Paige (N. Y.) 161; *Safford v. Safford*, 7 Paige (N. Y.) 259, 32 Am. Dec. 633; *Elwood v. Klock*, 13 Barb. (N. Y.) 50.

⁷⁶ 1 Paige (N. Y.) 634.

widow dower only in the remaining two-thirds of the proceeds. In this case the senior widow never took possession of any part of the land, nor had it been allotted to her by metes and bounds, but the court had decreed that she was entitled to dower, though it would have been inconvenient to have assigned it in the land itself. The court's decree was regarded as equivalent to an actual assignment.

On the other hand, in *Elwood v. Klock*,⁷⁷ a vendor sold by his sole deed certain land to the vendee, who sold in the same manner to the defendant. After the vendor's death, his widow (the senior widow) sued at law for her dower, but before she recovered judgment therefor she released her dower to the defendant. The court held that the release merely extinguished the dower right of the senior widow, without passing any interest to the defendant, and that the widow of the first vendee had full dower rights, not subject to be defeated or interfered with by the senior widow's claim of dower (now extinguished).

§ 252. **Same—3. Effect of an Intervening Vested Freehold Estate.** It has already been pointed out that for dower (and also for curtesy) it is essential that the consort should not only be seised during the coverture of a freehold estate, but he must be seised of the inheritance itself. He may be seised of the immediate estate of freehold in possession and of the estate of inheritance as separate estates; but in such case the inheritance generally merges or extinguishes the lesser freehold, leaving the consort seised directly and immediately of the inheritance itself.⁷⁸ Thus, if an estate be given "to A. for life, remainder to B. and his heirs," and A. subsequently purchases B.'s remainder, a merger takes place, A. is seised directly of the inheritance, and A.'s widow is dowable.⁷⁹

But it is a principle of the law governing merger that no merger of the lesser freehold occurs unless the inheritance is the next vested estate in remainder or reversion, without any intervening vested estate of freehold, and also without any intervening freehold interest by way of contingent remainder created at the same time and by the same act with the other estates.⁸⁰ Hence the intervention of a vested freehold interest between the immediate freehold in possession and the first estate of inheritance prevents a merger, whether all the estates are created by the same conveyance, as in case of a conveyance "to H. for life, remainder to B. for life, remainder to

⁷⁷ 13 Barb. (N. Y.) 50.

⁷⁸ Ante, §§ 201, 249; post, § 665 et seq.

⁷⁹ *Beardslee v. Beardslee*, 5 Barb. (N. Y.) 324.

⁸⁰ Post, §§ 333, 691; 2 Min. Insts. 424, 429; 2 Th. Co. Lit. 557, note (K); 3 Preston, Conv. 107 et seq.

H. and his heirs," or whether they arise at different times or by different acts, as where H., seised in fee, conveys "to A. for life, remainder to B. for life" and then buys back A.'s life estate. In no such case does H. become seised directly of the inheritance, but only of the lesser freehold with a remainder or reversion of the inheritance, at least so long as B. is living.

Applying these principles to dower (and curtesy), it will be perceived that if the circumstances are such that the lesser estate is merged in the inheritance⁸¹ the husband is then seised during the coverture directly of the inheritance itself, and the wife takes dower. But though the husband has the immediate freehold in possession and the first estate of inheritance, if there be an intermediate vested estate of freehold, and as long as it continues, no merger can occur, and the wife is denied dower (as in a corresponding case the husband is denied curtesy).⁸²

But a merger of the lesser freehold by the inheritance is not prevented by the intervention of a vested remainder for years only, and hence the interpolation of such a remainder between the immediate freehold in possession and the first estate of inheritance, both of which are vested in the husband, will not defeat the wife's dower.⁸³ She can only enjoy it, however, subject to the term for years already created.⁸⁴

If the intervening vested estate, though a freehold, is terminated during the coverture, there is no longer any obstacle to the merger of the husband's lesser estate by the inheritance, of which, therefore, the husband would become directly seised during the coverture, so that the widow is dowable as if there had never been an intervening freehold.⁸⁵

Suppose, for instance, a conveyance "to H. for life, remainder to B. for life, remainder to H. and his heirs." If B. should assign his estate to H. (or in technical language "surrender" it), the obstacle to the merger of H.'s life estate by his inheritance would be at once removed, and if this were done before or during the coverture, H.'s wife is dowable. It would be otherwise, however, if B. does not

⁸¹ An example of this is presented in *Beardslee v. Beardslee*, *supra*.

⁸² 2 Min. Insts. 151; 1 Th. Co. Lit. 560, notes (E), (F), 582, note (M); 4 Kent, Com. 39; 1 Scribner, Dower, 233; 1 Washburn, Real Prop. 204; Bates' Case, 1 Ld. Raym. 326; *Dunham v. Osborn*, 1 Paige (N. Y.) 634; *Eldredge v. Forrestal*, 7 Mass. 253; *Northcut v. Whipp*, 12 B. Mon. (Ky.) 65.

⁸³ 1 Scribner, Dower, 233; Park, Dower, 77; 4 Kent, Com. 39; Bates' Case, 1 Ld. Raym. 326; *Weir v. Humphries*, 39 N. C. 273; *Boyd v. Hunter*, 44 Ala. 705; *Sykes v. Sykes*, 49 Miss. 190.

⁸⁴ 1 Scribner, Dower, 233; *Boyd v. Hunter*, 44 Ala. 705.

⁸⁵ 1 Scribner, Dower, 234; Park, Dower, 74; Co. Lit. 29a.

surrender his entire estate, as where he surrenders or leases to H. for H.'s life only.⁸⁶ So, also, taking the example above given, if B. should die during H.'s lifetime, the merger would then at once occur and H.'s widow be dowable.

§ 253. **Same—4. Effect of an Intervening Contingent Freehold Estate.** It is quite well settled at common law that an intermediate contingent remainder of freehold intervening between an immediate freehold in possession and the first estate of inheritance does not prevent a merger of the lesser freehold by the inheritance, if they have come into the same hands at different times and by different acts.⁸⁷ Thus, if a conveyance be made to A. for life, with a contingent remainder to B. for life, remainder to H. in fee, and H. subsequently purchases A.'s life estate (or A. purchases H.'s inheritance), the inheritance and the lesser estate coming into the same hands at different times and by different acts, the inheritance merges the lesser freehold at common law and destroys B.'s contingent remainder.⁸⁸ In such case it is manifest that the wife should take dower at common law.⁸⁹

But a different rule prevails at common law in the case where the lesser freehold in the husband, the contingent remainder in the third party and the ultimate inheritance of the husband are all created by the same conveyance and at the same time, as upon a conveyance to H. for life, with a contingent remainder to B. for life, remainder to H. in fee. To permit a merger of H.'s life estate by his inheritance, and thus destroy the intermediate contingent remainder in B., would be to disappoint the manifest intention of the grantor (or testator), and hence, out of respect to that intention, no such merger occurs, even at common law, as will destroy the intermediate remainder.⁹⁰

Whether the wife's dower is defeated in such case depends upon the further question whether any merger at all takes place. Upon this point the authorities are divided; some holding that no merger whatever occurs, that the case is therefore analogous to that of an intervening vested estate of freehold, and that the wife's dower is

⁸⁶ 1 Scribner, Dower, 234.

⁸⁷ Post, §§ 333, 839; 2 Min. Insts. 424, 429; 2 Th. Co. Lit. 557, note (K); 3 Preston, Conv. 107 et seq.

⁸⁸ The destruction of B.'s remainder will be explained in connection with the discussion of contingent remainders. See post, § 636.

⁸⁹ 1 Scribner, Dower, 237; 1 Washburn, Real Prop. 205; Fearne, Cont. Rem. 317, 318, 322; Noel v. Bewley, 3 Sim. 103; Thompson v. Leach, 2 Salk. 427, 2 Vent. 198; Hooker v. Hooker, Cas. temp. Hardw. 13; Purefoy v. Rogers, 2 Saund. 380; Crump v. Norwood, 7 Taunt. 362.

⁹⁰ 2 Min. Insts. 424, 429; post, § 691.

totally defeated.⁹¹ But the better view is believed to be that in such case there is a merger *sub modo*, a qualified merger, which gives the husband the inheritance immediately, but subject to open up and let in the intervening remainder when it is ready to vest.⁹² In this aspect of the case, the husband being seised directly of the inheritance during the coverture, the wife would take dower, her estate subject to be defeated, however, by the happening of the event upon which the intermediate contingent remainder is to become vested.⁹³

In conclusion, it may be added that in any event, if the contingent remainder becomes vested during the coverture and remains a vested freehold remainder at the death of the husband, the wife cannot take dower.⁹⁴

§ 254. **Same—5. Husband's Inheritance must be Heritable by the Issue (if Any) as the Heirs of the Husband.** While it is not necessary, in order that the wife may take dower, that there should be any issue of the marriage,⁹⁵ yet it is essential that the husband's inheritance be of such character that it may descend upon the issue of the marriage, should there be any, as heirs of the husband. In this respect dower in no way differs from curtesy, except that curtesy requires that issue be actually born alive during the coverture.⁹⁶

If the issue is, by the terms of the instrument creating the husband's estate, to take the property by purchase (as devisees, etc.) after the husband's death, and not by descent from him, the wife must be denied dower, though the husband be seised during the

⁹¹ See 1 Hilliard, *Real Prop.* (2d Ed.) 134, § 49; Park, *Dower*, 70 et seq.; and 1 Washburn, *Real Prop.* 206, citing *Hooker v. Hooker*, *Cas. temp. Hardw.* 13, 2 Barnard (K. B.) 200, 380; *Plunkett v. Holmes*, *T. Raym.* 30; *Lewis Bowles' Case*, 11 Co. 80; *Crump v. Norwood*, 7 Taunt. 362; *Tud. Cas.* 43; *Fearne, Cont. Rem.* 343, 344; 1 *Atk. Conv.* 256.

⁹² 1 *Scribner, Dower*, 239, citing *Purefoy v. Rogers*, 2 Saund. 380, 387; *Lewis Bowles' Case*, 11 Co. 79a, 80a; *Co. Litt.* 28a; *Fearne, Cont. Rem.* 36; *Preston, Rule in Shelley's Case*, 80; 3 *Preston, Conv.* 113, 489; 1 *Roper, Husb. and Wife*, 9, 362 et seq.; 2 *Greenleaf, Cruise*, 272, 273; *Park, Dower*, 61, 62. This is certainly true in cases to which the rule in *Shelley's Case* is applicable, as in case of a conveyance to H. for life, with contingent remainder to B. for life, remainder to the heirs of H. See 2 *Min. Insts.* 405, 406; *Fearne, Cont. Rem.* 37; *Lewis Bowles' Case*, 11 Co. 80a; post, § 626.

⁹³ 1 *Scribner, Dower*, 239, 246; *Park, Dower*, 73; *House v. Jackson*, 50 *N. Y.* 161.

⁹⁴ See ante, § 252.

⁹⁵ 2 *Min. Insts.* 183; 1 *Scribner, Dower*, 229; *Co. Lit.* 40b.

⁹⁶ Ante, §§ 220, 226.

coverture of the inheritance.⁹⁷ In *Barker v. Barker*,⁹⁸ land was devised to the husband and his heirs, but if he should die leaving issue then to his children and their heirs. It was held that the wife should take no dower, because if there were any children of the marriage they would necessarily take as purchasers under the devise, and not by descent from the father.

Upon similar principles, if an estate be given to the husband and the heirs of his body by a certain wife, creating an estate tail special in the husband, upon the death of the wife named and his remarriage, the second wife would have no dower.⁹⁹

§ 255. IV. Death of the Husband. The fourth requisite for dower is the death of the husband. It is the natural, not the civil death of the husband that consummates the title of the wife to dower.¹

But upon common-law principles a presumption of death seems to be raised in case of any person who for seven years has not been heard from. Nevertheless, the law raises no presumption as to the precise time of death. But it may be inferred that he died before the expiration of the seven years, if it appears that within that period he encountered some specific peril or came within the range of some impending or imminent danger which might reasonably be expected to destroy life.²

§ 256. V. Dower a Prolongation of Husband's Inheritance Annexed by Law. The general rule is the same for dower as for curtesy.³ If the husband's estate expires by the regular efflux of the period marked out for it by its original limitation, leaving the previous seisin of the husband unimpaired, dower is a prolongation or continuation of the husband's inheritance annexed by force of law; but if (1) the husband's estate is terminated in such a manner as to defeat and annul the husband's seisin from the beginning (as by re-entry for express condition broken), so that in contemplation of law he was never seised during the coverture; or (2) if the husband's inheritance terminates (and is not merely transferred by him) in his lifetime, so that at his death there exists no estate to which the dower may be annexed, as a prolongation or continuation

⁹⁷ 2 Min. Insts. 152; 1 Th. Co. Lit. 577, 578; *Barker v. Barker*, 2 Sim. 249; *Sumner v. Partridge*, 2 Atk. 47.

⁹⁸ 2 Sim. 249. See, also, *Sumner v. Partridge*, 2 Atk. 47, discussed ante, § 222.

⁹⁹ 2 Bl. Com. 131; *Park, Dower*, 79; *Amcotts v. Catherick*, Cro. (Jac.) 615; *Norhcut v. Whipp*, 12 B. Mon. (Ky.) 65.

¹ 2 Min. Insts. 155; 1 Th. Co. Lit. 569, 580; 1 Bl. Com. 132, 133.

² *Davie v. Briggs*, 97 U. S. 628, 24 L. Ed. 1086.

³ Ante, § 229.

thereof (as in case of a fee qualified or a conditional limitation, the termination of which is dependent upon some event happening before the husband's death); or (3) if the subject-matter of the husband's estate ceases to exist with his death or before it—in none of these cases can the wife take dower.⁴

§ 257. **Dower in Equitable Estates of Husband.—1. In General.** By the original common law neither curtesy nor dower was permitted in uses or equitable estates. And while in process of time the common law came to allow curtesy in the equitable estates of inheritance whereof the wife was seised at some time during the coverture, just as if the estate were legal, dower therein has always been denied at common law.⁵

But while the English common-law rule in this respect has been followed in some jurisdictions in the United States, the general rule, frequently by express statutory provision, is to admit the widow to

⁴For the full discussion of these principles, accompanied by many illustrations, only a brief résumé of which has been attempted here, see ante, § 229 et seq. See, also, 2 Min. Insts. 129, 153, 154. The student is advised to turn to the previous discussion and review it thoroughly.

⁵Ante, § 223; 2 Min. Insts. 125, 141; 2 Bl. Com. 127, note (9); 1 Th. Co. Lit. 559, note (9), 576, note (25); Darcy v. Blake, 2 Sch. & Lefr. 388; Claiborne v. Henderson, 3 Hen. & M. (Va.) 322, 368, 386. This diversity is thus explained: When curtesy came to be allowed by the courts in equitable estates, there was no such difficulty in the way of adopting the new rule as existed in the case of dower. A married woman seised of an equitable estate, whether her husband was entitled to curtesy or not, could not transfer it at common law save by fine or common recovery—collusive suits which, upon common-law principles, could only be brought against the wife by uniting the husband with her as defendant. The wife, therefore, could make no conveyance without the husband's assent and joinder, which would operate to bar his curtesy if or when he had any. Hence the courts, in modifying their previous rulings and permitting curtesy thereafter in equitable estates, were not confronted with the difficulty that they might thereby impair the titles of persons who had theretofore purchased such equitable estates from married women.

But in the case of the wife's dower the opposite was true. Husbands, in conveying their equitable or other estates, need join their wives in the conveyance merely for the purpose of barring their dower, and if the wives had no dower (as in equitable estates) they were not joined in the conveyances of their husbands; the purchasers accepting the conveyances on the faith of the decisions that the wife would be denied dower therein. To have altered this rule (save by act of Parliament) would have necessarily resulted in the courts having to apply the new rule retrospectively to such past conveyances, and this would have impaired many titles. The courts, therefore, mercifully, perhaps, but very illogically, declined to extend the new rule to dower interests. See 2 Min. Insts. 125; 2 Bl. Com. 127, note (9); Sweetapple v. Bindon, 2 Vern. 536; Watts v. Ball, 1 P. Wms. 108; Casborne v. Scarfe, 1 Atk. 603; Darcy v. Blake, 2 Sch. & Lefr. 288.

dower in the equitable estates of the husband, although in most jurisdictions it is only allowed in such equitable estates as the husband died seised of, thus permitting the husband to convey them by his sole act during the coverture.⁶

§ 258. **Same—2. Equitable Conversion—Dower in Money Directed to be Invested in Land.** The principle upon which a court of equity proceeds in regarding money directed by a grantor or testator to be invested in land as if it were land is that equity regards as done what ought to be done.⁷ Hence, where money is directed by a will or deed to be invested in land for the benefit of a husband, he thereby at once acquires an interest which in equity is treated for most purposes as land, but it is only an equitable interest in land.⁸

At common law, dower is denied in this, as in all other equitable interests,⁹ though curtesy is permitted therein.¹⁰

§ 259. **Same—3. Dower in Vendee's Equitable Estate under a Contract to Convey Land.** If the owner of land agrees to convey the same to a vendee, the latter at once takes an equitable interest in the land to be conveyed, and thenceforth the vendor holds the land in equity in trust for the benefit of the vendee. This is but one form of the doctrine of equitable conversion.¹¹

The common-law rule denying dower in equitable estates seems to have been generally applied, both in England (prior to 3 and 4 Wm. IV, c. 105, allowing dower in such estates) and in most of these states (in the absence of statute), to this instance of equitable interests as well as to others.¹² Nevertheless these equitable interests, in this country, fall within the general rule already mentioned¹³ which is applied in most jurisdictions, and the wife's dower will attach to such lands as a husband retains, at his death, under a mere

⁶ 1 Scribner, Dower, 406, 413, et seq.; 1 Washburn, Real Prop. 234, 235; 1 Tiffany, Real Prop. § 184.

⁷ Ante, § 18.

⁸ Fletcher v. Ashburner, 1 Bro. Ch. 497, 1 White & Tud. Lead. Cas. Eq. 1118; ante, § 18.

⁹ Crabtree v. Bramble, 3 Atk. 680; Cunningham v. Moody, 1 Ves. Sr. 174; Fletcher v. Ashburner, 1 Bro. Ch. 497, 1 White & Tud. Lead. Cas. Eq. 1118; Park, Dower, 136.

¹⁰ Ante, §§ 213, 257; Sweetapple v. Bindon, 2 Vern. 536; Cunningham v. Moody, 1 Ves. Sr. 174; Fletcher v. Ashburner, 1 Bro. Ch. 497, 1 White & Tud. Lead. Cas. Eq. 1118.

¹¹ Ante, § 18 et seq.; 2 Min. Insts. 221.

¹² Rowton v. Rowton, 1 Hen. & M. (Va.) 92; Claiborne v. Henderson, 3 Hen. & M. (Va.) 322; Reed v. Whitney, 7 Gray (Mass.) 533; Hamlin v. Hamlin, 19 Me. 141; Secrest v. McKenna, 6 Rich. Eq. (S. C.) 72; Bowen v. Collins, 15 Ga. 100.

¹³ Ante, § 257.

contract of sale, subject, however, to the vendor's lien for the unpaid balance of the purchase money.¹⁴

§ 260. **Dower in Mortgaged Land—1. Dower Paramount to Mortgage.** When the inchoate right of dower of the wife has once attached to land by reason of the seisin of the husband, the right cannot be either divested or impaired by the sole act of the husband in mortgaging the land. Such a mortgage would be subordinate to the dower right; and upon the death of the husband, whether before or after foreclosure, the widow would be entitled to have her dower assigned without regard to the interest either of the mortgagee or of the purchaser of the land at foreclosure sale.¹⁵

§ 261. **Same—2. Dower Subordinate to Mortgage.** On the other hand, the right of-dower attaches subject to the mortgage in the following cases: (1) When the mortgage is in force at the time of the marriage; (2) when the land is already mortgaged at the time of the conveyance to the husband; and (3) when the land is conveyed to the husband during coverture, and as part of the same transaction he gives back a mortgage, in which his wife does not join, to secure the whole or a part of the purchase price.¹⁶ And although the wife's inchoate right of dower has already attached to the land, it is now everywhere provided by statute that by joining with her husband in the execution of a mortgage she may bar her right of dower in favor of the mortgagee and those claiming under him, thus subordinating her dower right to the mortgage. But when she joins with her husband in executing the mortgage, the wife's rights are not affected in favor of others than the mortgagee and his privies. The dower right is not extinguished; and consequently, if the mortgage be redeemed by either the husband or his heirs, the right is fully restored.¹⁷

§ 262. **Same—3. Dower before Foreclosure.** Whatever may be the nature of a mortgagee's interest—whether by the mortgage he acquires the legal estate in the land, or a mere lien¹⁸ (which is not

¹⁴ *Hamilton v. Hughes*, 6 J. J. Marsh. (Ky.) 581; *Lawson v. Morton*, 6 Dana (Ky.) 471; *Heed v. Ford*, 16 B. Mon. (Ky.) 114; *Pritts v. Ritchey*, 29 Pa. 71; *Junk v. Canon*, 34 Pa. 286; *Worsham v. Callison*, 49 Mo. 206; *Owen v. Robbins*, 19 Ill. 545.

¹⁵ *Ante*, § 241.

¹⁶ *Ante*, § 245.

¹⁷ *Post*, § 269.

¹⁸ There are, in the United States, two "theories" of mortgage. One is the legal or common-law theory, by which the land is conveyed to the mortgagee as security. The mortgagee acquires the legal title to the land, with the right of possession. But equity considers him as holding the legal estate in trust to restore it to the mortgagor upon payment of the debt. This leaves an equitable estate in the mortgagor, which is the subject of

either a legal or an equitable estate)—his wife, at his death before the maturity of the debt, and, indeed, at all times before foreclosure, takes no dower. If a mortgage creates a mere lien, there is no estate to which the right of dower could attach in favor of the mortgagee's wife. If the mortgage vests the mortgagee with the legal estate, he acquires but the bare naked legal title, without any present beneficial interest, and this, upon principles already considered, is not the subject of dower.¹⁹

On the other hand, the mortgagor's widow, under the same circumstances, assuming the mortgage to be paramount, would be entitled to dower, subject to be defeated by foreclosure.²⁰

§ 263. **Same—4. Dower after Foreclosure.** After the foreclosure of the mortgage and the death of the mortgagee, the right of the mortgagee's widow to dower depends upon whether the mortgaged land, upon such foreclosure, goes absolutely to the mortgagee, or whether he only has the right to have the property sold, the balance after paying the debt and interest to be paid to the mortgagor. The former is the common-law doctrine; the latter prevails in most of the states of this country.

The most important and difficult questions arising in this connection relate to the dower rights of the mortgagor's widow in the equity of redemption or surplus upon the foreclosure of the mortgage. The foreclosure may take place (1) after the husband's death, or (2) in his lifetime.

(1) If the mortgage be foreclosed after the mortgagor's death, so that at death he still has at least an equitable estate in the land, dower may be had therein.²¹

(2) If the mortgage be foreclosed in the husband's lifetime, the land sold, and a surplus be left after paying off the debt and inter-

dower (see ante, § 257) until suspended by the assertion on the part of the mortgagee to his right of possession, or destroyed by foreclosure.

A mortgage, under the lien theory, creates in the mortgagee nothing but a potential right to have the land sold to pay the debt. These theories are explained more fully in the chapter on Mortgages, post, § 532 et seq.

¹⁹Ante, § 244; 2 Min. Insts. 147.

²⁰2 Min. Insts. 142; *Heth v. Cocke*, 1 Rand. (Va.) 344; *Bullard v. Bowers*, 10 N. H. 500; *James v. Fields*, 5 Heisk. (Tenn.) 394; *Tarpley v. Gunnaway*, 2 Cold. (Tenn.) 246; *Ready v. Hamm*, 46 Miss. 422; *Cockrill v. Armstrong*, 31 Ark. 580; *Culver v. Harper*, 27 Ohio, 464; *Danforth v. Smith*, 23 Vt. 247, 259. And the same would seem to be true if the wife unites in a mortgage executed by the husband during the coverture. See *Bank of Ogdensburg v. Arnold*, 5 Paige (N. Y.) 38. As to the obligation of the mortgagor's widow, after assignment of her dower in mortgaged land, to pay interest upon the mortgage debt, and the principal thereof when it falls due, see ante, §§ 203, 261.

²¹2 Min. Insts. 142; *Heth v. Cocke*, 1 Rand. (Va.) 344.

est, such surplus, independently of statute, no longer constitutes an interest in land, but is merely personalty, as if by relation to the time when the lien was created.²² Hence, if the mortgage is executed before the marriage, and is foreclosed in the husband's lifetime, the mortgagor's wife, in the absence of statute, would get no dower in the surplus, which would be regarded as personalty from a time antedating the coverture.²³

It would seem to be otherwise, however, if the mortgage be executed after the marriage, the wife uniting therein; for the surplus is personalty only from the creation of the lien, and there would in this case be a time during the coverture, prior to such lien, when the husband's interest would be an interest in land.²⁴

§ 264. Dower in Rents, Franchises, and Other Incorporeal Property. It is not essential that the husband be seised of lands in order that the wife may have dower. She is dowable as well in other property, provided it be real estate whereof the husband is during the coverture seised of an estate of inheritance.²⁵

Thus the widow may have dower in a rent of inheritance.²⁶ Hence, if one seised of land in fee simple conveys it in fee, reserving an annual rent to himself and his heirs forever, marries and dies, his widow is entitled to one-third of this fee simple rent for her life as tenant in dower.²⁷ And so, if one grants an annual rent issuing out of lands to one in fee simple, upon the death of the grantee, his widow has dower in the rent granted.

Rents being thus sometimes the subjects of dower (and curtesy), there may devolve upon the consort the necessity to elect whether to insist upon his or her rights of curtesy or dower in the rent or in the land out of which it issues. Hence, if the husband after marriage, his wife not uniting, conveys land of which he is seised to another in fee simple, reserving a rent to himself and his heirs forever, in such case the husband has been seised during the coverture of both land and rent. But the widow cannot have dower

²² 2 Min. Insts. 142; *Wilson v. Davisson*, 2 Rob. (Va.) 384.

²³ 2 Min. Insts. 142; *Wilson v. Davisson*, 2 Rob. (Va.) 384. See *Wheatley v. Calhoun*, 12 Leigh (Va.) 264, 37 Am. Dec. 654; *Frost v. Peacock*, 4 Edw. Ch. (N. Y.) 678.

²⁴ See *Ratcliffe v. Mason*, 92 Ky. 190, 17 S. W. 438; *Chauey v. Chaney*, 38 Ala. 35; *Cook v. Cook*, 20 N. J. Eq. 375; *Church v. Church*, 3 Sandf. Ch. (N. Y.) 434; *Maccubbin v. Cromwell*, 2 Har. & G. (Md.) 443; *Jefferies v. Allen*, 33 S. C. 268, 11 S. E. 764; *Chaffee v. Franklin*, 11 R. I. 578.

²⁵ The wife is dowable only in lands and tenements. 2 Bl. Com. 131; Litt. § 36.

²⁶ 2 Min. Insts. 148.

²⁷ 2 Min. Insts. 151.

of both, but will be constrained to elect between them, holding the land, of course (if she elect to take that), discharged of the rent.²⁸

So, also, a widow is dowerable of fisheries, franchises, and indeed of all incorporeal hereditaments,²⁹ except annuities and corodies, which last are not lands or tenements, but are personalty.³⁰

§ 265. **Dower in Mines and Quarries.** As to mines and quarries which have been opened and worked at the time of the husband's death, it is well settled both in England and in this country that the dowress has the right to continue to work such as are found thus already opened and worked upon the land assigned to her by way of dower³¹—and this, whether or not the working of the mines or quarries has been long discontinued. It is still an open mine.³²

A mine is an "open" mine, the profits of which may be enjoyed by the dowress, if any part of the ore bed or deposit of mineral has been excavated for the purpose of mining the same. In such case the mine consists of the whole bed and the strata lying under it, and in order to reach such mine new pits or shafts may be sunk upon the original vein and to the underlying strata.³³

But if the mines or quarries have never been opened or worked before the husband's death, the decided weight of authority is to the effect that the widow cannot, by virtue of her dower right, take out the ore, slate, stone, etc., contained therein, without being guilty of waste.³⁴

²⁸ 2 Min. Insts. 148.

²⁹ In the case of easements and profits à prendre appendant to land, the widow only gets dower in the easement or profit à prendre where she is dowerable of the land to which it is appendant. 1 Scribner, Dower, 199; Park, Dower, 114; 1 Washburn, Real Prop. 168; Wyman v. Oliver, 75 Me. 421.

³⁰ Ante, § 62; 2 Min. Insts. 148; 1 Washburn, Real Prop. 219. And, indeed, a franchise may be likewise personal rather than real property, in which case, of course, curtesy and dower therein must be denied. Ante, § 63; 2 Min. Insts. 148, 149.

³¹ 2 Min. Insts. 149; 1 Th. Co. Lit. 581, note (L); 3 Th. Co. Lit. 237, note (H); 1 Washburn, Real Prop. 217; Clavering v. Clavering, 2 P. Wms. 388; Stoughton v. Leigh, 1 Taunt. 402; Crouch v. Puryear, 1 Rand. (Va.) 258, 10 Am. Dec. 528; Billings v. Taylor, 10 Pick. (Mass.) 460, 20 Am. Dec. 533; Coates v. Cheever, 1 Cow. (N. Y.) 460; Hendrix v. McBeth, 61 Ind. 473, 28 Am. Rep. 680.

³² Coates v. Cheever, 1 Cow. (N. Y.) 460; Gaines v. Green Pond Iron Min. Co., 33 N. J. Eq. 603.

³³ 2 Min. Insts. 149; Crouch v. Puryear, 1 Rand. (Va.) 258, 10 Am. Dec. 528; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263.

³⁴ 2 Min. Insts. 149; Bond v. Godsey, 99 Va. 564, 566, 39 S. E. 216; Stoughton v. Leigh, 1 Taunt. 402; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; Marshall v. Mellon, 179 Pa.

Thus, in *Bond v. Godsey*,³⁵ it was held that in estimating the commuted value of an estate by the curtesy in certain lands, chiefly valuable for their timber and the underlying minerals, but upon which no mines had been opened, the value of the minerals should be deducted from the gross value of the land, since the tenant by the curtesy had no interest in, and no right to open and work, unopened mines.

§ 266. **Dower in Wild and Uncultivated Lands.** While it is generally true of all tenants for life or for years that they cannot, without committing waste, cut down timber growing upon the land save in the exercise of the right of estovers,³⁶ yet (1) if the land had been habitually utilized in that way, or (2) if the land is chiefly valuable for the timber, or (3) if the land, when denuded of its timber, is more valuable than before, and the market value of the timber is less than the cost of clearing the land, in none of these cases is it waste in a tenant for life by act of the parties to cut it down, because in the first two cases it is the evident intention of the grantor or testator that the tenant should thus utilize and enjoy the land, and in the last the cutting of the timber would not constitute a permanent injury to the inheritance.³⁷

Whether this same principle is applicable to tenants in dower and by the curtesy, who come in by act of the law is more doubtful. Even here, however, if the cutting of the timber results in no permanent injury to the inheritance, but rather in a benefit, as in the third case above mentioned, it would seem clear that the tenant in

371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601. The right of a dowress to open new mines is to be distinguished from that of other life tenants, who come in by act of the parties, not of the law. The rights of the latter must in large measure depend upon intention, while the rights of the dowress (or the tenant by the curtesy) are independent of intention. One who leases for life to another mineral lands, which are known to both parties to be such and to be useful for nothing save mining, must be held to have intended to pass mining rights, though no mines be actually opened. *Kier v. Peterson*, 41 Pa. 361; *Seager v. McCabe*, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247, 250. The same principle is not necessarily applicable to the rights of a dowress.

For the rights of a life tenant with respect to oil and gas (fugitive in their nature), see 7 Va. Law Reg. 365.

³⁵ 99 Va. 564, 39 S. E. 216. But see *Seager v. McCabe*, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247.

³⁶ Ante. §§ 38, 39; *Hawpe v. Bumgardner*, 103 Va. 96, 48 S. E. 554. See *Calvert v. Rice*, 91 Ky. 533, 16 S. W. 351, 34 Am. St. Rep. 240, note.

³⁷ 2 Min. Insts. 149; *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733; *Macaulay v. Dismal Swamp Land Co.*, 2 Rob. (Va.) 507, 530; *Bond v. Godsey*, 99 Va. 564, 567, 39 S. E. 216; *Owen v. Hyde*, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467.

dower or by the curtesy might thus utilize the land without risk of impeachment for waste.³⁸

In other cases, such as the first two above mentioned, the courts are divided upon the right of the tenant in dower (or by the curtesy) to make use of the land by cutting and selling the timber thereon. The life tenant by act of the parties is entitled to do so, because such was the probable mode of enjoyment intended by the parties; but the tenant in dower (and by the curtesy), coming in by act of the law, can rest their claim upon no such ground. Upon general principles such acts upon the part of the dowress would seem to be waste.³⁹

In any event, however, it would seem there must be left enough timber to satisfy the necessities of the land itself; what will suffice for that purpose being a question of fact, to be determined upon all the circumstances of the case.⁴⁰

§ 267. Dower in Lands Exchanged. There is at common law a conveyance termed an "exchange,"⁴¹ the peculiarity of which, when once validly created, is that by a single act and instrument it effects a complete exchange of ownership in several tracts of land between the several parties to it. It operates at one and the same moment to divest the title of one tract out of the former owner and vest it in another, while at the same time divesting the latter of his tract and vesting it in the first party. It operates an exchange of the tracts by one conveyance, and dispenses with the necessity of mutual conveyances between the parties.

If a party to an "exchange" should fail to unite his wife in the conveyance, and should later die, he will have been seised during the coverture of both tracts, or rather, in contemplation of law, since the one tract is a substitute for the other, he will have been seised of either tract. In such case, therefore, the widow is dowable of either tract; but she cannot have dower in both. She will be required to elect between them.⁴²

³⁸ 2 Min. Insts. 149; *Bond v. Godsey*, 99 Va. 564, 567, 39 S. E. 216. See *Owen v. Hyde*, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467.

³⁹ 1 Washburn, Real Prop. 218; *Brackett v. Persons Unknown*, 53 Me. 238, 87 Am. Dec. 548, note.

⁴⁰ *Macaulay v. Dismal Swamp Land Co.*, 2 Rob. (Va.) 507, 528; *Bond v. Godsey*, 99 Va. 564, 568, 39 S. E. 216.

⁴¹ For a more detailed account of this conveyance, see post, § 969.

⁴² 2 Min. Insts. 150; 1 Th. Co. Lit. 576; 1 Washburn, Real Prop. 208; *Stevens v. Smith*, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205. The fact that she subsequently unites with her husband in conveying the tract last acquired does not indicate an election to take dower in that tract, but rather the reverse. *Mahoney v. Young*, 3 Dana (Ky.) 588, 28 Am. Dec. 114.

But if, instead of the technical conveyance of "exchange," the parties simply execute mutual conveyances, each of his own tract to the other, there is considerable question as to whether this doctrine can be applied, on the ground that in the latter case the husband has during the coverture been seised of both tracts, not merely of either, and hence that the widow, not having united in the husband's conveyance of his former tract, is entitled to dower in both.⁴³

§ 268. **Dower in Crops.** The widow, succeeding to the husband's lands as tenant in dower, succeeds also to the annual crops growing upon the land of which she is endowed at the time of her accession, as against the husband's personal representative or his heir or devisee.⁴⁴ And upon the rather unfair presumption that such crops are always growing upon the land when her dower is assigned the widow's personal representative is refused emblements upon her death, as a sort of compensation to the husband's estate for the supposed earlier loss.⁴⁵ But this unjust rule was altered in England by the statute of Merton, 20 Hen. III, c. 2.⁴⁶

§ 269. **I. General Nature of Wife's Contingent Right of Dower.** The right of dower is consummated and raised to the dignity of an estate in land by the death of the husband only.⁴⁷ Before that event, and while the coverture continues, the wife's right of dower is merely inchoate, a contingent possibility, and not a vested estate.⁴⁸ At the same time, it is a valuable right which will be fully protected by the courts. Indeed it is a general maxim that the law favors dower.⁴⁹

Some important results flow from the fact that the right of dower during the coverture is a mere possibility or contingent right.

⁴³ 1 Washburn, Real Prop. 208, 209; 1 Scribner, Dower, 284; Cass v. Thompson, 1 N. H. 65, 8 Am. Dec. 36; Mosher v. Mosher, 32 Me. 412. See Wilcox v. Randall, 7 Barb. (N. Y.) 633. But see Mahoney v. Young, 3 Dana (Ky.) 588, 28 Am. Dec. 114.

⁴⁴ Ralston v. Ralston, 3 G. Greene (Iowa) 533.

⁴⁵ Ante, § 44; 2 Min. Insts. 104. Even at common law the rule was otherwise in case of the tenant by the curtesy. Ante, § 44.

⁴⁶ Ante, § 44; 2 Min. Insts. 104; 1 Washburn, Real Prop. 220.

⁴⁷ Post, § 298; ante, § 255.

⁴⁸ Hoy v. Varner, 100 Va. 602 et seq., 42 S. E. 690; Flynn v. Flynn, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98, 68 Am. St. Rep. 427; Moore v. Mayor, etc., of City of New York, 8 N. Y. 110, 59 Am. Dec. 473; Hawley v. Bradford, 9 Paige (N. Y.) 200, 37 Am. Dec. 390; Magee v. Young, 40 Miss. 164, 90 Am. Dec. 322; McCraney v. McCraney, 5 Iowa, 232, 68 Am. Dec. 702.

⁴⁹ Lewis v. Apperson, 103 Va. 624, 49 S. E. 978, 68 L. R. A. 867, 106 Am. St. Rep. 903; Simar v. Canaday, 53 N. Y. 304, 13 Am. Rep. 523; Gore v. Townsend, 105 N. C. 228, 11 S. E. 160, 8 L. R. A. 443; Mandel v. McClave, 46 Ohio St. 407, 22 N. E. 290, 5 L. R. A. 519, 15 Am. St. Rep. 627; Duncan v. City of Terre Haute, 85 Ind. 104; Grenier v. Klein, 28 Mich. 17.

Thus, it is settled that the Legislature may constitutionally abolish dower, and make the statute applicable even to women already married and possessed of a contingent dower interest, notwithstanding the fourteenth amendment, prohibiting the states to deprive any person of property "without due process of law," for this applies only to vested rights.⁵⁰

So, also, it is established that the joinder of the wife with the husband in a conveyance or mortgage of his lands only releases and extinguishes the wife's contingent right of dower, and passes no interest from the wife; so that one who receives such a conveyance or mortgage, if the wife survive the husband, cannot be regarded as the assignee of the wife's dower estate and entitled to assert it as she might have done but for the conveyance, but merely as the assignee of the husband's interest, with the wife's claim to dower extinguished.⁵¹ But such release or extinguishment operates only as between the wife and the purchaser or his privies. Hence, if the husband's deed, in which the wife has joined, is set aside by creditors as fraudulent and void, the wife is restored to her dower rights.⁵²

Again, by reason of the fact that the wife's dower interest during the coverture is a bare contingency or possibility, upon a condemnation under eminent domain of the husband's lands for public use, the contingent right of dower is discharged; and, though no separate compensation is made to her, she cannot after her husband's death recover dower in the lands so taken.⁵³ Nor can she claim

⁵⁰*Alexander v. Alexander*, 85 Va. 369, 7 S. E. 335, 1 L. R. A. 125; *Moore v. Darby*, 6 Del. Ch. 193, 18 Atl. 768, 13 L. R. A. 346; *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322; *Ware v. Owens*, 42 Ala. 212, 94 Am. Dec. 672; *Meliset's Appeal*, 17 Pa. 449, 55 Am. Dec. 573; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355; *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200.

⁵¹2 Min. Insts. 175; 1 Washburn, Real Prop. 261; *Land v. Shipp*, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560; *Hawley v. Bradford*, 9 Paige (N. Y.) 200, 37 Am. Dec. 390; *Moore v. Mayor, etc., of City of New York*, 8 N. Y. 110, 59 Am. Dec. 473; *Elwood v. Klock*, 13 Barb. (N. Y.) 50; *Hinchliffe v. Shea*, 103 N. Y. 153, 8 N. E. 477; *Learned v. Cutler*, 18 Pick. (Mass.) 9; *Magwire v. Riggin*, 44 Mo. 512, 515.

⁵²*Post*, § 284; 1 Washburn, Real Prop. 261; *Corr v. Porter*, 33 Grat. (Va.) 278, 285; *Hinchliffe v. Shea*, 103 N. Y. 153, 8 N. E. 477; *Robinson v. Bates*, 3 Metc. (Mass.) 40; *Richardson v. Wyman*, 62 Me. 280, 16 Am. Rep. 459; *Ridgway v. Masting*, 23 Ohio St. 294, 13 Am. Rep. 251. But see *Morton v. Noble*, 57 Ill. 176, 11 Am. Rep. 7. Upon similar principles, if the grantee of the husband in a deed wherein the wife unites recovers in a suit against the husband upon his covenant of seisin (whereby the husband's deed is avoided), it has been held that he can no longer plead the deed in defeat of the wife's dower. 1 Washburn, Real Prop. 262; *Stinson v. Sumner*, 9 Mass. 143, 6 Am. Dec. 49.

⁵³*Moore v. Mayor, etc., of City of New York*, 8 N. Y. 110, 59 Am. Dec. 473; *Gwynne v. City of Cincinnati*, 3 Ohio, 24, 17 Am. Dec. 576.

in such case the right to any separate portion of the money received for the land either immediately or upon condition that she survive the husband.⁵⁴ And upon similar reasoning the contingent dower interest of the wife is destroyed by a sale of the husband's lands for delinquent taxes.⁵⁵

§ 270. II. Effect of Alienage of Husband or Wife in Preventing Creation of Contingent Dower Right. A distinction is to be noted between the prevention and the defeat of dower. Under certain circumstances the contingent right of dower is prevented altogether from accruing; the wife never acquires it. Under other circumstances the contingent dower right may be created, but may be subsequently barred or defeated or relinquished by the wife's own act or by other means.

The former of these two results was effected at common law by the alienage of either husband or wife. At common law, an alien is incapable of holding any real estate whatever (save only terms for years to a very limited extent for purposes of habitation or of trade), and therefore an alien husband might possess no land of which a citizen wife could be endowed, nor might the alien wife of a citizen husband pretend to claim the freehold estate of dower.⁵⁶

But many of the states have entirely removed the disabilities of alienage, and others have modified the common-law rule by statute.⁵⁷ Furthermore, the rights of aliens may be controlled by a treaty of the United States with a foreign nation; such treaty being "the supreme law of the land."⁵⁸

§ 271. III. Effect of Antenuptial Conveyance by Husband in Preventing Contingent Dower. Inasmuch as the wife can take

⁵⁴ *Flynn v. Flynn*, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98, 68 Am. St. Rep. 427. And it is said that a voluntary dedication by the husband alone to a public use is equivalent to a condemnation, in cutting off the wife's contingent dower right. *Venable v. Wabash*, West. Ry. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; 1 Washburn, Real Prop. 279. But see *Nye v. Taunton Branch R. Co.*, 113 Mass. 277.

⁵⁵ *Jones v. Devore*, 8 Ohio St. 430. But see *Blevins v. Smith*, 104 Mo. 583, 16 S. W. 213, 13 L. R. A. 441.

⁵⁶ 2 Min. Insts. 165; 1 Th. Co. Lit. 572, 573; 1 Bl. Com. 372, note (6). By the statute 7 and 8 Vict. c. 66, if an alien woman marry an English subject she becomes naturalized. And a similar doctrine prevails in the United States under the act of Congress regulating naturalization. Rev. St. U. S. §§ 351, 1994; 2 Min. Insts. 165; 1 Washburn, Real Prop. 252. See 1 Scribner, Dower, 151 et seq.; *Kelly v. Owen*, 7 Wall. 498, 19 L. Ed. 283; *Burton v. Burton*, 40 N. Y. 373; *Alsberry v. Hawkins*, 9 Dana (Ky.) 177, 33 Am. Dec. 546.

⁵⁷ See 1 Washburn, Real Prop. (6th Ed.) p. 263, where the statutes of the various states are collated.

⁵⁸ Const., U. S. art. 6, § 2.

dower only in the lands of which the husband is seised at some time during the coverture, the general rule is that there can be no dower in lands which the husband has conveyed absolutely (or even contracted to convey) before marriage.⁵⁹

But to this general rule there is an exception which demands brief consideration, namely, where the husband executes a conveyance in anticipation of his marriage, and with intent to defraud the prospective wife of her marital rights; and the same rule applies to curtesy. Indeed, the law goes so far as to declare that a conveyance made by husband or wife, upon the eve of marriage, without the knowledge of the prospective consort, is deemed in fraud of such consort's marital rights, and is therefore voidable by her or him.⁶⁰

This principle, however, is subject to several qualifications. Thus it has been held admissible for one consort to convey property on the eve of marriage without the other's knowledge, in order to secure or satisfy a just debt.⁶¹ And it is said that this may be done by the wife, even in order to provide for the children of a former marriage.⁶² While this may be true where it is the wife who conveys thus on the eve of marriage, it seems to be pretty well established that the husband cannot thus convey to a child by a former marriage, or to a mother or other relative, without the knowledge and in fraud of his intended wife, and such a conveyance is voidable by her.⁶³

So, if the conveyance is made before the marriage is contemplated, notwithstanding the marriage may in fact occur soon after, it is not voidable for fraud.⁶⁴

⁵⁹Ante, §§ 244, 245. It is otherwise if he has merely mortgaged the land before marriage, for the wife is still dowable as against all persons but the mortgagee and those claiming under him. Ante, § 260 et seq.

⁶⁰2 Min. Insts. 674; *Jenkins v. Rhodes*, 106 Va. 564, 56 S. E. 332; *Leach v. Duvall*, 8 Bush (Ky.) 201; *Manikee v. Beard*, 85 Ky. 20, 2 S. W. 545; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; *Kelly v. McGrath*, 70 Ala. 75, 45 Am. Rep. 75; *Kline v. Kline*, 57 Pa. 120, 98 Am. Dec. 206; *Logan v. Simmons*, 38 N. C. 487; *Dunnock v. Dunnock*, 3 Md. Ch. 140; *Smith v. Smith*, 6 N. J. Eq. 521; *Tucker v. Tucker*, 29 Mo. 350; *Dearmond v. Dearmond*, 10 Ind. 194; *Thayer v. Thayer*, 14 Vt. 122, 39 Am. Dec. 211.

⁶¹*Fletcher v. Ashley*, 6 Grat. (Va.) 332.

⁶²2 Min. Insts. 674.

⁶³*Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211; *Petty v. Petty*, 4 B. Mon. (Ky.) 215, 39 Am. Dec. 501. But it is otherwise if there is some anterior equitable claim on the part of the donee, e. g., antecedent promises, indebtedness, etc. *Firestone v. Firestone*, 2 Ohio St. 415; *Champlin v. Champlin*, 16 R. I. 314, 15 Atl. 85; *Dudley v. Dudley*, 76 Wis. 567, 45 N. W. 602, 8 L. R. A. 814.

⁶⁴2 Min. Insts. 674; *Strathmore v. Bowes*, 1 Ves. Jr. 22, 1 White & Tud. Lead. Cas. Eq. 395; *Gregory v. Winston*, 23 Grat. (Va.) 102.

§ 272. IV. Sundry Devices to Prevent Wife's Inchoate Dower from Accruing—In General. In former times great ingenuity was exercised by conveyancers to formulate conveyances which, while preventing the accrual of the wife's dower and thus rendering it unnecessary for the husband, when he might wish to transfer his interest, to go through the tedious and expensive proceedings of fines and recoveries required by the common law in order that a wife might validly release her dower,⁶⁵ yet might vest in the husband grantee the complete and absolute property, dominion and control of the land conveyed.⁶⁶

Before examining these devices in detail, it will be well to note carefully the purpose in view. The design is to give the husband an indefeasible inheritance, enjoyable in præsentī, freely alienable by his sole act during the coverture or devisable at his death, without any claim of dower upon the wife's part.⁶⁷

Of course it would be easy by invoking simple principles already discussed to prevent the accrual of the wife's dower; but to accomplish this without curtailing in any way the husband's enjoyment of the property and his power of disposition over it is a more difficult problem.

For example, nothing would be easier than to prevent the wife's dower by giving the husband only a life estate;⁶⁸ or by giving to another the immediate freehold during the coverture, and the inheritance to the husband by way of remainder;⁶⁹ or by giving the husband the immediate inheritance with the proviso that if he have children the estate shall go to the children as purchasers or devisees, not as heirs of the husband;⁷⁰ or by interposing an intermediate vested estate of freehold between the immediate freehold of the husband in possession and the husband's inheritance;⁷¹ or at common

⁶⁵ Post, § 282.

⁶⁶ 2 Min. Insts. 168. The various devices by which this result was accomplished, though no longer of as great practical account as formerly, seeing that the wife may release her dower easily and inexpensively in modern times by merely uniting with the husband in his deed of conveyance or mortgage, are yet of importance, not only because they well illustrate many of the important and abstruse principles governing dower, but also because circumstances may arise where, by reason of domestic unhappiness and contention, or for other reasons, a husband may desire to purchase land to which no claim of dower may legally attach, and which he may freely transfer without the necessity of obtaining his wife's assent, or where, in the examination of titles, it may become important to ascertain whether, as a matter of fact, a wife's dower has attached as an incumbrance upon the title. The same principles are applicable in the main to prevent the curtesy of the husband.

⁶⁷ 2 Min. Insts. 168.

⁶⁸ Ante, § 249.

⁶⁹ Ante, § 249.

⁷⁰ Ante, § 254.

⁷¹ Ante, § 252.

law by giving the husband an equitable estate only,⁷² or an estate owned by him as a joint tenant with another (that is, if the husband die first);⁷³ or in still other ways. All of these are, or have been, adequate for the mere purpose of preventing the wife's dower; but they are all obnoxious to the objection that the husband's dominion and control over the property is more or less curtailed.

§ 273. **Same—1. First Device to Prevent Dower—Objections Thereto.** The first device consists of a conveyance in the form following: "To H. (husband) and a trustee and their heirs, but as to the trustee and his heirs, in trust for H. and his heirs." It depends for its effect upon the common-law principle that for dower the husband must be sole seised.⁷⁴

The objections to this device, even at common law, are serious, so far as concerns the husband's complete enjoyment and control of the property. For, if the trustee survives, the whole estate vests in him under the common-law doctrine of survivorship between joint tenants,⁷⁵ excluding, it is true, the wife's dower as to the legal estate, while the equitable estate in the husband and his heirs is not at common law subject to dower;⁷⁶ but this is done at the expense of creating an equitable estate in the husband and his heirs, which is more or less objectionable. The trustee may be faithless and refuse to convey the legal title to the husband, or his heirs or assignees, or, by a positive breach of trust, may embarrass the title, necessitating a suit in equity; and at all events there would be the trouble and expense of procuring the title to be divested out of the trustee. Besides all this, the husband may survive the trustee, in which case the complete legal title would vest in him by survivorship and might thus become subject to dower.⁷⁷

In this country generally this device would be of no avail, because a widow is dowable of equitable estates enjoyed by the husband at the time of his death.

§ 274. **Same—2. Second Device, and the Objections Thereto.** The second device to prevent the accrual of dower depends simply upon the common-law principle that the wife is not dowable of an equitable estate;⁷⁸ the conveyance being made in some such form as the following: "To a trustee and his heirs in trust for H. and his heirs."⁷⁹

⁷²Ante, § 257 et seq.

⁷³Ante, § 246.

⁷⁴2 Min. Insts. 168; 1 Bright, Husb. and Wife, 516; ante, § 246.

⁷⁵Post, § 732.

⁷⁶Ante, § 257 et seq.

⁷⁷2 Min. Insts. 168, 169; 1 Bright, Husb. and Wife, 516, 517.

⁷⁸Ante, § 257 et seq.

⁷⁹2 Min. Insts. 169; 1 Bright, Husb. and Wife, 517.

Even at common law the objections stated in the preceding section with respect to the embarrassments of title connected with equitable estates would discourage the use of this device to attain the end desired. And in the United States generally it would be utterly worthless to prevent dower, since dower is freely allowed in equitable estates.⁸⁰

§ 275. *Same*—3. *Third Device, and the Objections Thereto.* The third device depends upon the principle that the exercise of a power of appointment by one having an interest in land defeats the appointor's seisin from the beginning; the appointee holding, not under the appointor, but under the donor of the power.⁸¹

Thus a conveyance or devise "to such uses as H. shall appoint, and until appointment to the use of H. and his heirs," prevents the accrual of dower on the part of H.'s widow if H. should make the appointment (which amounts to a complete power of disposition); the appointee of H. being regarded as holding under H.'s grantor or testator, and H.'s seisin being wholly defeated by the appointment. Until an appointment by deed or will H. is seised of the inheritance and has the full enjoyment of the land. And though, if H. dies without exercising the power of appointment, his widow is entitled to dower, yet H. has the full enjoyment and power of disposition, and may if he choose by an appointment by sole deed or by will defeat the wife's dower altogether.⁸²

§ 276. *Same*—4. *Fourth Device, and Objections Thereto.* The fourth device depends upon the principle that in order to dower, the husband must have the immediate estate of freehold in possession and the first estate of inheritance, without an intervening estate of freehold.⁸³ Taking advantage of this principle, the plan of the device is to give the husband the immediate freehold and also the inheritance, but by the same conveyance to interpolate between these two estates an intermediate freehold estate in another, which, however, shall be so remotely contingent in fact as not seriously to interfere with the husband's powers of disposition.

The device usually appears in the form of a conveyance or devise "to H. for his life, and if by any means that estate should come to

⁸⁰ 2 Min. Insts. 169; ante, § 257 et seq.

⁸¹ Post, § 1041; 2 Min. Insts. 169, 821; 1 Bright, Husb. and Wife, 518; Paine's Case, 8 Co. 34b, note (A); Maundrell v. Maundrell, 10 Ves. 263; Ray v. Pung, 5 B. & Ald. 561.

⁸² 2 Min. Insts. 169; 1 Bright, Husb. and Wife, 342, 518; 1 Washburn, Real Prop. 268; Ray v. Pung, 5 B. & Ald. 561; Maundrell v. Maundrell, 10 Ves. 263, 264; Cunningham v. Moody, 1 Ves. Sr. 177; Doe v. Martin, 4 T. R. 65; Doe v. Weller, 7 T. R. 478.

⁸³ Ante, §§ 252, 253.

an end in H.'s lifetime,⁸⁴ remainder to Z. for the residue of H.'s life, remainder after H.'s death to H. and his heirs."⁸⁵ The intervening remainder to Z. is practically negligible, so far as it affects H.'s enjoyment and control of the property, or his ability to dispose of it to a purchaser. But whether he must unite his wife with him in the conveyance or may convey by his sole act (that is, whether the wife's dower is prevented or not) depends upon three difficult points, namely: (1) Is Z.'s estate a valid remainder; if so (2) is the remainder in Z. a vested or contingent remainder; and (3) if contingent, does the interpolation thereof, between the two estates in H. by the same conveyance prevent the accrual of the wife's dower?

(1) It has been questioned whether Z.'s remainder is valid as a remainder, upon the ground that it violates that rule for remainders, presently to be considered, which demands that a remainder must await the regular expiration of the estate preceding it, and must not take effect in derogation thereof.⁸⁶ But that it is a good remainder is an indubitable, though not an undoubted, fact.⁸⁷ The explanation afforded by Mr. Fearne (none of the other writers seem to have vouchsafed any explanation at all) is merely that forfeiture for the breach of an implied condition is "one of the regular modes of determination incident to an estate for life and to which its nature is subject in its original limitation."⁸⁸ The limitation in question, therefore, is in effect a limitation "to H. for life or until his estate shall by some means come to an end in his lifetime, and in the latter case to Z.," etc. Hence Z.'s estate is not in derogation of H.'s life estate, but awaits its regular termination by one of the two limitations appointed to determine it.⁸⁹

⁸⁴ This could only occur by a voluntary surrender by H. of his estate or by the improbable event of a forfeiture by H. for the breach of one of the conditions implied by law in every grant of an estate for life or years. Ante, § 195 et seq.

⁸⁵ 2 Min. Insts. 171; Fearne, Cont. Rem. 217, 218, 347; 1 Bright, Husb. and Wife, 518, 519; Duncomb v. Duncomb, 3 Lev. 437.

⁸⁶ Post, § 592.

⁸⁷ 2 Min. Insts. 172; Duncomb v. Duncomb, 3 Lev. 437; Hooker v. Hooker, Cas. temp. Hardw. 17; Smith v. Packhurst, 3 Atk. 135. The fact is indeed the foundation of the practice of limitations to trustees to preserve contingent remainders. Fearne, Const. Rem. 217, 218, 326, 347; post, §§ 636, 637.

⁸⁸ Fearne, Cont. Rem. 16; 2 Min. Insts. 172.

⁸⁹ 2 Min. Insts. 172. So presented, the explanation is sustained and confirmed by Lord Vaux's Case, 1 Cro. (Eliz.) 269, wherein a grant to A. until B. returned from beyond sea or died, and then to C., was held a good vested remainder in C. So, in Luxford v. Cheeke, 3 Lev. 125, 126, the devise "to W. for life if she do not marry, but if she do marry, remainder to B.," was held to create a valid vested remainder in B., to take effect at her death if she do not marry, and if she do marry immediately upon the marriage. See, also,

(2) Conceding Z.'s remainder to be good as a remainder, the second question is whether it is a vested or a contingent remainder. Mr. Fearné holds it to be a vested remainder, and he is supported in this view by the weight of authority.⁹⁰

(3) If Z.'s remainder be contingent, the question whether it prevents the dower of H.'s wife depends, as we have seen, upon the mooted question whether the merger of H.'s lesser freehold by his inheritance is prevented by the interpolation by the same conveyance of a contingent remainder of freehold between the two estates, the better opinion seeming to be that the merger takes place *sub modo*; that is, subject only to the rights of the remainderman when the remainder is ready to vest, thus giving the wife dower, subject to the rights of the remainderman.⁹¹

§ 277. V. Contingent Dower Barred or Defeated after It has Accrued—Discussion Outlined. Supposing the dower right not to have been prevented in its very inception, so that it has attached to the husband's property as an inchoate interest or a contingent possibility, we are now to examine some of the more important means by which it may be barred or defeated during the coverture.

It may be conceded as a general proposition that, after the inchoate dower has once attached to land whereof the full and rightful title belongs to the husband, it constitutes an incumbrance thereon which cannot be divested by the sole act of the husband,⁹² but only by the consent, or at least by the default, of the wife.⁹³

The modes of barring or defeating dower may be enumerated as follows: (1) The recovery of the land by title paramount; (2) divorce, as a bar to dower; (3) the wife's elopement from the husband and her living in adultery with another; (4) wife's joinder

Lady Ann Fry's Case, 1 Vent. 199; Foster v. Lord Romney, 11 East. 594; Fearné, Cont. Rem. 19; 2 Th. Co. Lit. 59, approving Lord Vaux's Case. In these cases, upon either termination, the remainder was to take effect.

⁹⁰ Fearné, Cont. Rem. 216, 217; 2 Min. Insts. 172; Duncomb v. Duncomb, 3 Lev. 437; Hooker v. Hooker, Cas. temp. Hardw. 17; Smith v. Parkhurst, 3 Atk. 135; 4 Bro. Cas. Pass. 353; Lord Vaux's Case, 1 Cro. (Eliz.) 269; Luxford v. Cheeke, 3 Lev. 125, 126. But since Z. is not to take the remainder upon either termination of H.'s estate (that is, either upon forfeiture or upon H.'s death), but only in case it is terminated in one of the modes—by forfeiture—and it being uncertain whether it will ever so terminate, and even most improbable that it ever will, it is difficult to see how Z.'s remainder can be other than contingent.

⁹¹ Ante, § 253.

⁹² There seems to be an exception to this rule in the case of a voluntary dedication by the husband alone of his land to a public use, which is regarded as equivalent to a condemnation thereof. Ante, § 269.

⁹³ For the use of "trust terms attendant upon the inheritance" to bar dower, see 2 Min. Insts. 166 et seq.

with the husband in his transfer of the land; (5) jointure, as a bar to dower; (6) wife's agreement with the husband to relinquish her dower as a bar thereto; (7) wife barred of her dower by estoppel.

§ 278. (I) **Dower Barred by Recovery of Land under Title Paramount.** If the land be conveyed to the husband upon a condition subsequent which is broken, the grantor's re-entry for the breach of the condition is under a paramount title, avoiding the husband's seisin ab initio, and the wife's dower is defeated.⁹⁴

So it is, also, if the husband's land is taken by condemnation proceedings, under the paramount title of the state by virtue of its power of eminent domain.⁹⁵ And where the land is sold by order of court subjecting it to a lien which has precedence over the wife's dower right, her dower in the land is thereby defeated, though she may have dower in the surplus.⁹⁶

So, also, a judgment actually recovered for the land by a claimant under a title superior to that of the husband necessarily defeats the wife's dower, since her title to dower can rise no higher than its source, the husband's title to the land, and the recovery, if bona fide, shows his title to have been inferior to that of the claimant.⁹⁷

§ 279. (II) **Dower Barred by Divorce.** We have already discussed pretty fully the effect of divorce a vinculo and a mensa in defeating the estate by the curtesy.⁹⁸ Precisely the same principles apply to dower.

It is sufficient to remind the reader that a divorce a vinculo defeats both curtesy and dower, as well the rights of the innocent as of the guilty party, and as to property already acquired as well as to that acquired thereafter, while a divorce a mensa, or judicial separation, is at common law no bar to such rights.⁹⁹

§ 280. (III) **Dower Barred by Wife's Elopement and Living in Adultery.** Even though there be no divorce or perpetual separation, it is provided by the English statute Westm. II (13 Edw. I, c. 34) that if a wife, of her own free will, leave her husband and live in adultery, she shall be barred of her dower, unless her husband be afterwards reconciled to her and suffer her to live with him.

In the construction of this statute, it has been held that going willingly with or to an adulterer, or a voluntary separation from her husband followed by adultery, is a "living in adultery," though she remains not with her paramour continually, or be detained by

⁹⁴ Ante, § 242.

⁹⁵ Ante, § 269.

⁹⁶ Ante, § 263.

⁹⁷ Ante, § 242; 2 Min. Insts. 165; Bac. Abr. Dower (F).

⁹⁸ Ante, § 212.

⁹⁹ Ante, § 212.

him against her will; also, that the husband's license and previous consent to the adultery will not purge her guilt nor repel its consequences; and that, while subsequent cohabitation is in general satisfactory proof of reconciliation, it is not necessarily so, and reconciliation, as well as cohabitation, is requisite to rehabilitate the wife.¹

The fact that the wife is compelled by her husband's conduct to leave him, if she afterwards refuses to return to him and lives in adultery, does not prevent the bar.² But if the husband first deserts the wife, her subsequent adultery does not bar her dower, in the absence of a divorce.³ It is further to be observed that under the statute she must have left her husband. If she commits adultery while still living with him, her dower is not thereby barred.⁴

On the other hand, her mere desertion of the husband, no adultery being committed, does not bar her dower.

§ 281. (IV) **Dower Barred by Wife's Joinder with Husband in Transfer.** The wife's release of her contingent or inchoate dower interest by uniting with the husband in his transfer of the land is in modern times much the more usual means of barring dower; but the present easy and convenient mode of doing this by the simple joinder of the wife in the husband's deed was unknown to the common law, and is the result of legislation which, being in derogation of the common law, is in general to be strictly construed and followed.⁵

§ 282. **Same—1. Common-Law Doctrine as to Married Women's Conveyances.** The disabilities which at common law beset married women and rendered void their contracts, executed as well as executory, were based upon two grounds: (1) That the wife's identity was regarded for such purposes as merged in that of her husband, constituting them one person in law, and that one the husband; ⁶ and (2) that the wife was presumed to be under the coercion and controlling influence of her husband, and her contracts, therefore, to be made under a practical duress.⁷

¹ 2 Min. Insts. 165; 1 Th. Co. Lit. 609, 610, notes (108), (H, 1); *Haworth v. Herbert*, 2 Dy. 106 b; *Woodward v. Dowse*, 10 C. B. (N. S.) 722, 732; *Stegall v. Stegall*, 2 Brock, 256, 260, Fed. Cas. No. 13,351; *Bell v. Nealy*, 1 Bailey (S. C.) 312, 19 Am. Dec. 686; *Reel v. Elder*, 62 Pa. 316, 1 Am. Rep. 414; *Walters v. Jordan*, 35 N. C. 361, 57 Am. Dec. 558.

² *Bell v. Nealy*, 1 Bailey (S. C.) 312, 19 Am. Dec. 686.

³ *Reel v. Elder*, 62 Pa. 316, 1 Am. Rep. 414; *Shaffer v. Richardson*, 27 Ind. 122; *Cogswell v. Tibbetts*, 3 N. H. 41.

⁴ 1 Washburn, Real Prop. 253; *Cogswell v. Tibbetts*, 3 N. H. 41.

⁵ Post, § 283, note.

⁶ 2 Min. Insts. 173; 1 Bl. Com. 442, 444.

⁷ 2 Min. Insts. 173; 1 Bl. Com. 444.

These presumptions of the common law, from a business standpoint, effectually tied the hands of a married woman and (aided by the common-law rule that her personalty becomes vested in the husband immediately upon the marriage) reduced her to a condition of pupillage and dependence upon her husband which was both highly inconvenient and shocking to modern ideas of propriety and justice.

Indeed, the inconvenience of this principle, as applied to the transfer of property, early became so great that the courts set themselves to find some way of evading the rule as to the married woman's conveyances of land, without surrendering the general principle. At a remote period, therefore, it came to be the settled law of England that a married woman might convey lands and interests therein by means of the collusive suit known as a "fine," and, later, by means of a "common recovery," wherein the intending purchaser, upon a pretense of a superior title, would bring an action against the husband and wife jointly, laying claim to the land proposed to be sold. In the fine, the parties, by leave of court, pretended to compromise the suit by the surrender of the land to be conveyed, acknowledging the title thereto to be in the prospective purchaser, all of which was made matter of record in the court, and judgment would be given therefor to the prospective purchaser.⁸ The common recovery was based upon similar principles, save that, instead of a compromise, the defendants (the prospective grantors) would by nonappearance permit a judgment by default to be rendered against them for the land to be conveyed.⁹ These collusive proceedings, of course, had the connivance of the judges, who saw in them the opportunity for a freer transfer of lands.

By these means the obstacles above mentioned to a married woman's conveyance of her interests in land were removed. The legal identity of husband and wife did not go so far as to prevent one claiming under a paramount title from recovering land from a married woman in a suit brought for that purpose against her and her husband jointly; and the necessary joinder of the husband in the suit secured his assent to the transfer. Thus the first objection, the legal identity of the husband and wife—was obviated.¹⁰ The other objection—that the influence of the husband operated as a coercion of the wife—was rendered nugatory by the court-made rule that the wife be examined privily and apart from her husband by the court or some accredited officer thereof, to ascertain

⁸ 2 Min. Insts. 173, 991; 2 Bl. Com. 348; Williams, Real Prop. 46, 47, 212.

⁹ 2 Min. Insts. 993 et seq.; 2 Bl. Com. 357 et seq.

¹⁰ 2 Min. Insts. 174.

that she was acting voluntarily and not under the husband's influence and coercion.¹¹

The same objections existed at common law if the land were the husband's, and he sought to convey it with the wife's assent, free from her dower. She could not unite directly in the husband's conveyance because of her disabilities, and hence resort must be had to the same methods of conveyance; that is, by fine or recovery.

These cumbersome modes of transferring lands involved both time and expense, and upon the first settlement of this country were almost immediately superseded by statutory provisions permitting the joint deed of the husband and wife, executed in the manner designated by the statutes, effectually to pass the title of both husband and wife to any property possessed by either. Hence in practice fines and common recoveries have rarely been used in the United States.¹²

In the case of married women's conveyances under such statutes, it is to be noted that the first ground of the married woman's common-law disability (that is, the legal identity of the husband and wife) is obviated by the inherent force of the statute itself; while the second ground (that is, the controlling influence of the husband) may be evaded in the same manner as at common law, by the privy examination of the wife apart from the husband, or if the Legislature sees fit by the direct force of the statute.¹³

Another general proposition applicable to such conveyances may be derived from the principle that legislative acts in derogation of the common law are to be strictly construed. That proposition is that no substantial requirement of such statutes can be omitted without invalidating the transfer—at least, so far as the married woman's share in it is concerned.¹⁴

§ 283. Same—2. Effect of Wife's Joinder in Husband's Conveyance. Should the husband by his sole act convey, mortgage or contract to convey his land to another, the wife's contingent right of dower remains to her, and should she survive her husband she may enforce it against the grantee, mortgagee or vendee, to whose claims the dower is superior.¹⁵ But she may during the lifetime of her husband release her contingent right of dower to such grantee, mortgagee or vendee, and, indeed, to any tenant of the freehold, except the husband himself.¹⁶

¹¹ 2 Min. Insts. 174; 2 Bl. Com. 351.

¹² 1 Washburn, Real Prop. 256; Fowler v. Shearer, 7 Mass. 14; Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277.

¹³ 2 Min. Insts. 174, 175.

¹⁴ 2 Min. Insts. 174. See Geil v. Geil, 101 Va. 773, 45 S. E. 325.

¹⁵ Post. § 297 et seq.

¹⁶ Land v. Shipp, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560; Anon, 2 Cro.

If the wife unites in the husband's conveyance, her joinder does not actually transfer any estate from the wife; for her inchoate dower is a mere contingent possibility, not an estate. Her joinder operates merely as a release enuring by way of extinguishing her future contingent rights as against the purchaser and those claiming by, through or under him. Hence one who receives such a release cannot in general be regarded as an assignee of the wife's dower right (in the event she survives her husband) and entitled to assert it as she might have done but for the release.¹⁷ So, also, a release of her dower to the husband's grantee has been held not to prevent her from claiming dower against a mortgagee of the land, whose claim was inferior to that of the wife for dower, though superior to that of the husband's grantee.¹⁸

§ 284. Same—3. Effect of Wife's Joinder in Husband's Void Conveyance. If the husband's conveyance is void or avoided by decree of court, since the wife's joinder only operates to extinguish her contingent dower as against the grantee and those claiming under him, it is apparent that the wife's dower right remains in her unimpaired, because the grantee has never taken a valid and rightful interest in the husband's lands under the deed.¹⁹ Hence, if a husband executes a conveyance which is fraudulent as between the parties and is set aside, and the purchase money required to be re-

(Jac.) 151; *Mason v. Mason*, 140 Mass. 63, 3 N. E. 19; *Pixley v. Bennett*, 11 Mass. 298; *Moore v. Mayor, etc., of City of New York*, 8 N. Y. 110, 59 Am. Dec. 473; *Johnston v. Smith*, 70 Ala. 108; *Reiff v. Horst*, 55 Md. 47; *New York Life Ins. Co. v. Mayer*, 108 N. Y. 655, 15 N. E. 444; *Pillow v. Wade*, 31 Ark. 678.

¹⁷ 2 Min. Insts. 175; *Hoy v. Varner*, 100 Va. 600, 42 S. E. 690; *Corr v. Porter*, 33 Grat. (Va.) 286; *Learned v. Cutler*, 18 Pick. (Mass.) 9; *Robinson v. Bates*, 3 Metc. (Mass.) 40; *Moore v. Mayor, etc., of City of New York*, 8 N. Y. 110, 59 Am. Dec. 473; *Hinchliffe v. Shea*, 103 N. Y. 153, 8 N. E. 477; *White v. White*, 16 N. J. Law, 202, 31 Am. Dec. 232; *French v. Lord*, 69 Me. 537; *Dearborn v. Taylor*, 18 N. H. 153; *Nickell v. Tomlinson*, 27 W. Va. 697; *Mandel v. McClave*, 46 Ohio St. 407, 22 N. E. 290, 5 L. R. A. 519, 15 Am. St. Rep. 627. The title is not to two estates or interests—that of the husband and that of the wife—but to one estate, that of the husband, discharged of the wife's contingent claim of dower. *Corr v. Porter*, supra.

¹⁸ *Littlefield v. Crocker*, 30 Me. 192.

The student should remember that the circumstances under which, and the instrument by which, a wife may release her inchoate right of dower are entirely governed by statute, which is always strictly construed, and that the statutes in the several states are not uniform. Whether her capacity is confined to a release by joining with her husband in an instrument purporting to convey the land, or extends to a release executed by herself alone, and whether she can act through an attorney in fact, are questions which can only be answered by the statute of the state in which the land lies. See *Washburn, Real Prop.* (6th Ed.) § 425.

¹⁹ *Ante*, § 283.

funded, the wife, though joining in the deed in good faith, is entitled to her dower in the land.²⁰

So, if the conveyance be valid as between the parties, but void or actually avoided by decree of court as to third persons, such as creditors, the same result follows—at least, as against the creditors or other third persons. Hence, if the husband's conveyance (in which the wife unites) is made with intent to defraud creditors, and has been set aside at their instance, the wife's dower is thereby restored to her, and she can claim it as against the creditors; for her release operated to extinguish it only as against the grantee and those claiming under, not paramount to, him.²¹ But if only part of the land conveyed is required to satisfy the defrauded creditors, the grantee being entitled to the rest, it would seem clear that as to that portion the wife's release would be effectual to bar her dower.

For similar reasons, it has been held that if the husband's grantee recovers in an action on the covenant of seisin (the effect of which is to avoid the deed) the wife's dower is thereby revived.²²

§ 285. Same—4. Effect of Wife's Joinder in Husband's Mortgage or Deed of Trust. If the wife unites in a mortgage or deed of trust upon the husband's land to secure a debt due by him, in this case, also, her joinder operates to release her dower merely as against the mortgagee or trustee and those claiming by, though or under them.²³ Thus, in a case where the wife united in a deed of trust executed by her husband upon land already subject to a mechanic's lien, which was therefore paramount to the deed of trust, though subordinate to the wife's dower, upon a sale of the land under the mechanic's lien, it was held that the purchaser thereat could not defeat the widow's claim to dower in the land by pleading her joinder in the deed of trust.²⁴

²⁰ *Stinson v. Sumner*, 9 Mass. 143, 6 Am. Dec. 49; *Morton v. Noble*, 57 Ill. 176, 11 Am. Rep. 7.

²¹ 1 Washburn, Real Prop. 261; *Blow v. Maynard*, 2 Leigh (Va.) 30; *Robinson v. Bates*, 3 Metc. (Mass.) 40; *Hinchliffe v. Shea*, 103 N. Y. 153, 8 N. E. 477; *Malloney v. Horan*, 49 N. Y. 111, 10 Am. Rep. 335; *Richardson v. Wyman*, 62 Me. 280, 16 Am. Rep. 459; *Ridgway v. Masting*, 23 Ohio St. 294, 13 Am. Rep. 251; *Lowry v. Fisher*, 2 Bush (Ky.) 70, 92 Am. Dec. 475; *Bohannon v. Combs*, 97 Mo. 446, 11 S. W. 232, 10 Am. St. Rep. 328. See *Hyatt v. Zion*, 102 Va. 909, 48 S. E. 1.

²² *Stinson v. Sumner*, 9 Mass. 143, 6 Am. Dec. 49.

²³ 2 Scribner, Dower, 307; *Corr v. Porter*, 33 Grat. (Va.) 285; *Hoy v. Varner*, 100 Va. 604, 42 S. E. 690; *McCabe v. Bellows*, 7 Gray (Mass.) 148, 66 Am. Dec. 467; *Jones v. Bragg*, 33 Mo. 337, 84 Am. Dec. 49; *Gove v. Cather*, 23 Ill. 634, 76 Am. Dec. 711.

²⁴ *Gove v. Cather*, 23 Ill. 634, 76 Am. Dec. 711. See, also, *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63.

And even as to the mortgagee or trustee and their privies the wife's dower is extinguished by her joinder only so far as is necessary to secure the debt. If that be paid by the husband himself or his personal representative, her dower right is at once restored entire, and if it is found necessary to sell the land under the mortgage or deed of trust, or if to save it from sale the mortgage debt is paid by some one interested other than the husband or his personal representative, she has dower in the surplus.²⁵

Nor can the wife, merely because she unites in the husband's mortgage, without pledging herself personally nor her property as security for the husband's debt, be regarded in any sense as a surety for her husband, and hence entitled to exoneration out of his other estate or out of the surplus after the sale of the property and the payment of the debt; that is, she is not entitled to be paid the full value of the dower right she has lost by joining in the mortgage, but she is to be paid only one-third of the surplus.²⁶

§ 286. **Same—5. Effect of Joinder of Wife Who is an Infant, Insane or under Disabilities.** The statutes authorizing the wife to unite in the husband's conveyance to bar her dower were intended to obviate no other disability on the part of wife save coverture alone.²⁷ Hence, if a married woman is an infant, the fact that she has united with the husband in his deed does not operate to bar her dower. Her deed is as voidable as that of any other infant.²⁸

If the wife be insane, her joinder in the husband's deed would of course be nugatory, but provision is made in several states by statute to permit the husband nevertheless to pass a title unimpeachable by the wife through the decree of a court of equity; the insane wife, or her committee if there be one, being made a party to the proceeding.

§ 287. **Same—Specific Enforcement in Equity of Husband's Contract to Convey Land.** If the husband, without the joinder of his wife, enters into a contract to convey a title to the vendee free from the claims of the vendor's wife for dower, there was formerly much diversity of opinion in England as to the power of the court of chancery to compel the specific performance of the contract.²⁹ But the more recent and the better English opinion is that to com-

²⁵ See ante, § 260 et seq.; *Land v. Shipp*, 100 Va. 337, 41 S. E. 742. See *Filler v. Tyler*, 91 Va. 458, 22 S. E. 235.

²⁶ *Hoy v. Varner*, 100 Va. 602 et seq., 42 S. E. 690; *Land v. Shipp*, 100 Va. 337, 41 S. E. 742; *Hawley v. Bradford*, 9 Paige (N. Y.) 200, 37 Am. Dec. 390; *Bank of Commerce v. Owens*, 31 Md. 320, 1 Am. Rep. 60.

²⁷ 2 Min. Insts. 174, 654.

²⁸ *Thomas v. Gammel*, 6 Leigh (Va.) 9, 12, 15.

²⁹ 2 Scribner, *Dower*, 316, 317. See *Morris v. Stephenson*, 7 Ves. 474; *Rust v. Whittle*, Lath. 94; *Berry v. Wade*, Finch, 180.

pel the husband to specific performance of such a contract is to place an unfair duress upon the wife to do an act she is under no legal obligation to do, and that the vendee must therefore be relegated to his action at law against the husband for damages.³⁰

Nor does the fact that the wife has united with the husband in his contract to convey, in the absence of statute, affect this result; for the wife's contract is at common law totally void, and is as if she had never assented thereto. She cannot be compelled to join in the conveyance, nor can her husband be compelled to induce her to consent to unite therein, for that would be to bring upon her a cruel moral constraint that would be unjust to her.³¹ And in the United States this is undoubtedly the prevailing doctrine, in the absence of statute.³²

But the courts are much divided upon the question whether such a contract can be enforced against the husband alone as to his rights in the land, leaving the wife's rights therein intact, where she refuses to join in the conveyance. Some courts hold that the husband cannot be compelled to convey at all in such case, unless the purchaser is willing to pay the full purchase price, deducting nothing on account of the failure of the wife to release her dower, on the ground that to allow the purchaser an abatement of the price on this account would be to make a new contract for the parties and in a sense would constitute a coercion of the wife.³³ Other courts hold that the husband may be compelled to convey such title as he can give, allowing the purchaser an abatement of the purchase price by way of compensation for the incumbrance of the wife's dower; the measure of such abatement being the commuted value of the dower interest with which the wife refused to part.³⁴

³⁰ 2 Min. Insts. 886; 2 Scribner, Dower, 317; 2 Story, Eq. Jur. § 732 et seq.; Emery v. Wase, 8 Ves. 514; Mortlock v. Buller, 10 Ves. 305; Innis v. Jackson, 16 Ves. 367; Davis v. Jones, 1 Bos. & Pul. N. R. 267.

³¹ Emery v. Wase, 8 Ves. 514 et seq., and other cases cited supra.

³² 2 Min. Insts. 886; 2 Scribner, Dower, 318; Graybill v. Brugh, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133; Butler v. Buckingham, 5 Day (Conn.) 492, 5 Am. Dec. 174; Martin v. Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; Wiswall v. Hall, 3 Paige (N. Y.) 313; Tevis v. Richardson, 7 T. B. Mon. (Ky.) 655; Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353, 20 Am. Dec. 145; Purcell v. Goshorn, 17 Ohio, 105, 49 Am. Dec. 448; Davenport v. Sovil, 6 Ohio St. 459; Roseburgh v. Sterling, 27 Pa. 292. So a deed incomplete from a defective acknowledgment or want of delivery will not be enforced as a contract to convey. Jenkins v. Harrison, 66 Ala. 345; Martin v. Dwelly, supra; Carr v. Williams, 10 Ohio, 305, 36 Am. Dec. 87; Leland's Appeal, 13 Pa. 84.

³³ Graybill v. Brugh, 89 Va. 895, 898, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133. And see Burk's Appeal, 75 Pa. 141, 15 Am. Rep. 587; Clark v. Seirer, 7 Watts (Pa.) 107, 32 Am. Dec. 745.

³⁴ Barnes v. Wood, L. R. 8 Eq. 424, 38 L. J. Ch. 683; Woodbury v. Luddy, 14 Allen (Mass.) 1, 92 Am. Dec. 731; Davis v. Parker, 14 Allen (Mass.) 94;

§ 288. (V) Jointure as a Bar to Dower—1. Origin. Soon after the first introduction of uses into England (in the latter part of the reign of Edward III, about A. D. 1370), and while they were as yet only equitable estates,³⁵ they became so prevalent, by reason of the escape they afforded from many of the feudal burdens attaching to the legal title held by feudal tenure, that it became the custom for expectant husbands, since the wife would not be dowable of uses (equitable estates), to make some special provision for their wives on the eve of marriage by way of marriage settlement.³⁶

This was commonly done by revoking the existing uses of a portion of their lands, the power to do which was usually reserved, and limiting them anew "to the use of the husband himself until marriage, then jointly to the use of the husband and wife during the coverture, remainder to the use of the survivor for life, remainder to the first and other sons of the marriage in tail, remainder to the daughters of the marriage in tail, remainder to the heirs (general) of the husband." The joint estate to the husband and wife during the coverture thus created gave rise to the designation "jointure," which means nothing more than a joint estate.³⁷

But when the statute of uses (27 Hen. VIII, c. 10) was enacted, its chief object was to convert uses into legal estates, in which in the main it succeeded.³⁸ In consequence of this enactment the husband at once became legally seised of the lands he had held before only by way of use, and all the then wives in England, who had such marriage settlements as above described, would themselves have had a joint estate at law such as they would before have in equity. Furthermore, the equitable estate of inheritance belonging to the husband having been thus converted by the statute into a legal estate of inheritance, the then wives would become dowable in those lands, as well as entitled to the jointure created by the marriage settlement, and would thus have received a double provision, had not the statute of uses itself, in anticipation of this difficulty, declared that a jointure, provided it had certain attributes, should constitute an absolute bar to the widow's dower.³⁹

Young v. Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453; *Leach v. Forney*, 21 Iowa, 271, 89 Am. Dec. 574; *Springle v. Shields*, 17 Ala. 295; *Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45; *Walker v. Kelly*, 91 Mich. 212, 51 N. W. 934. See *Shaw v. Vincent*, 64 N. C. 690.

³⁵ Uses were converted for the most part into legal estates by the Statute of Uses, 27 Hen. VIII, c. 10. See post, § 401.

³⁶ 2 Min. Insts. 177.

³⁷ 2 Min. Insts. 177, 272; 2 Bl. Com. 137.

³⁸ See post, §§ 401, 408, et seq.

³⁹ 2 Min. Insts. 177; 2 Bl. Com. 137, 138.

§ 289. **Same—2. Requisites for Jointure under the English Statute of Uses.** The English statute of uses declared that when a wife's jointure possessed the following five attributes it should be an absolute bar to her dower in a court of law if made before marriage, while if made after marriage she could elect either: It was necessary (1) that the jointure be of lands, tenements, or hereditaments; (2) that the jointure be an estate of freehold in the wife, for the life of the wife, at least; (3) that it take effect immediately upon the husband's death; (4) that it be made to herself, and not to another in trust for her; and (5) that it be expressly declared to be given in lieu of her whole dower.⁴⁰

The jointure may be made either before or after marriage; but by an express provision of the statute of uses, if made during the coverture, the widow may elect between jointure and dower.⁴¹

§ 290. **Same—3. Equitable Jointure.** If the foregoing five requisites be not all found in the provision made by the husband for the wife, and yet it is manifest that the husband did not intend her to have the provision and her dower also, such provision will, if made with the express assent of the wife, operate in equity, to bar her dower as effectually as legal jointure; and equity will interfere by injunction to restrain the widow from claiming her dower at law.⁴² The property settled may be either real or personal; ⁴³ but the provision must be fair and adequate.⁴⁴ Equitable jointure made before marriage is a complete bar to dower; but if made during coverture, or by will, the widow is put to her election.⁴⁵

§ 291. **Same—4. Law Controlling Whether Provision for Wife Bars Dower.** The question whether a provision in lieu of dower shall bar the dower is a part of the law of dower, and is to be determined by the law of the place where the land is situated (*lex situs*), though the testator reside elsewhere, upon the general principle of the Conflict of Laws that all matters connected with the title to real estate are regulated by the *lex situs* of the land.⁴⁶

But the question whether a bequest or devise to the wife, not expressed to be in lieu of dower, shall be presumed to be so intended, is a matter of the interpretation of the will, and, in case of a bequest of personalty at least (and probably, also, in the case of a

⁴⁰ 2 Min. Insts. 177; 1 Th. Co. Lit. 611; 2 Bl. Com. 138; *Land v. Shipp*, 98 Va. 291, 36 S. E. 391, 50 L. R. A. 560.

⁴¹ 27 Hen. VIII, c. 10, § 9; 2 Bl. Com. 138.

⁴² 1 Roper, *Husb. and Wife*, 486.

⁴³ *Drury v. Drury*, 2 Eden, 39; *Colbert v. Rings*, 231 Ill. 404, 83 N. E. 274.

⁴⁴ *Graham v. Graham*, 143 N. Y. 573, 38 N. E. 722; *West v. Walker*, 77 Wis. 557, 46 N. W. 819.

⁴⁵ 1 Reeves, *Real Prop.* § 513.

⁴⁶ *Minor*, *Conf. Laws*, §§ 11, 12.

devise of land), is to be determined in accordance with the law of the testator's domicile (*lex domicilii*).⁴⁷ Hence, where a testator, domiciled in New York, bequeathed personal property to his wife, but made no disposition of his land in Virginia, there being no inherent incompatibility between the wife's claim to her jointure and her claim to dower, the provision of the personalty not being expressed to be in lieu of her dower, it was held that the law of New York (*lex domicilii*) must decide whether the provision was intended to be in lieu of dower. And since that law declared that there must be on the face of the will a demonstration of the testator's intent to cut out dower, the widow was allowed to take both provisions.⁴⁸

§ 292. Same—5. Effect of Loss of Jointure. Under the English statute, since the jointure is the consideration for the wife's surrender of her dower rights, the loss by title paramount of the property given her by way of jointure operates to vest in her once more a right to her dower *pro tanto*, since the husband's provision for her out of property not rightfully his is no provision at all.⁴⁹

It is to be observed in conclusion that, if the value of the jointure of which she is deprived is greater than that of her entire dower interest, she is not entitled to recover anything in excess of her legal dower. The purpose of the statute is not to increase the share in her husband's lands to which the widow is entitled by way of dower.⁵⁰

§ 293. Same—6. Advantages of Jointure over Dower. Passing by any advantage accruing to the widow by reason of the superior value of the jointure in a particular case, as compared with the value to be placed upon the widow's dower lands, or vice versa, and supposing them to be pecuniarily of equal value, the principal advantage the jointure possesses over dower is that the widow may enter upon her jointure immediately upon her husband's death, without any formal process, merely as his grantee or devisee, whilst she must wait for her dower to be assigned to her, and if it be delayed, can compel its assignment only by process of law.⁵¹

§ 294. (VI) Effect of Wife's Agreement with Husband to Relinquish Her Dower. If the ensuing marriage is the only consideration to support such relinquishment, no other provision being made

⁴⁷ Minor, *Conf. Laws*, § 13; *Bolling v. Bolling*, 88 Va. 524, 14 S. E. 67.

⁴⁸ *Bolling v. Bolling*, 88 Va. 524, 14 S. E. 67.

⁴⁹ 1 Th. Co. Lit. 570, note (6), 614, note (M, 1); 2 Bl. Com. 138; Statute of Uses, 27 Hen. VIII, c. 10, § 7. See *Jones v. Hughes*, 27 Grat. (Va.) 560.

⁵⁰ 2 Scribner, *Dower*, 433; *Beard v. Nuthall*, 1 Vern. 427; *Tew v. Winterton*, 3 Bro. Ch. 489, 1 Ves. Jr. 451.

⁵¹ 2 Min. Insts. 180; 1 Th. Co. Lit. 615, note (O, 1); 2 Bl. Com. 138.

by the expectant husband for her in lieu of her dower thus surrendered, it would seem that such an unconscionable contract between persons so related ought not to be upheld.⁵²

A case arises where there is a mutual antenuptial agreement on the part of husband and wife each to relinquish all marital rights in the other's property. The weight of authority in this case seems to favor the proposition that such an antenuptial agreement is a bar to the wife's dower.⁵³

A postnuptial agreement, entered into by the wife on one side and the husband on the other, by which she relinquishes or agrees to relinquish her dower to him, his heirs, or his grantees, is void, as are all a married woman's contracts at common law.⁵⁴

§ 295. (VII) **Wife's Dower Barred by Estoppel.** There are certain cases, not falling strictly under any of the modes of barring dower heretofore described, wherein the widow may be in equity, if not at law, estopped to claim her dower.

(1) Thus, while it is a general rule of the common law that dower, being a claim to a freehold, cannot be barred by a collateral satisfaction, as by the payment to the widow of money before and instead of an assignment of her dower, or by the assignment to her of lands in which she is not dowable, or of a rent issuing out of such lands, even though she consent to the arrangement,⁵⁵ yet in equity a different rule prevails, and the valid acceptance of a freehold or leasehold interest in other lands, or of a sum of money, or of any other collateral satisfaction in lieu of her dower estops her to claim her dower, provided she be *sui juris* and apprised of her rights.⁵⁶

(2) So the wife's acceptance of an interest in the land of which she is dowable, which is inconsistent with a claim to dower in those lands, will estop her to claim dower, at least *pro tanto*, if she be *sui juris* at the time of such acceptance. Hence, if she accept from the heir a lease for life of the whole of her husband's estates of inherit-

⁵² *Hinkle v. Hinkle*, 34 W. Va. 142, 11 S. E. 993; *Croade v. Ingraham*, 13 Pick. (Mass.) 33; *Hastings v. Dickinson*, 7 Mass. 153, 5 Am. Dec. 34; *Gibson v. Gibson*, 15 Mass. 106, 8 Am. Dec. 94; *Vance v. Vance*, 21 Me. 364; *Grogan v. Garrison*, 27 Ohio St. 59.

⁵³ *Findley v. Findley*, 11 Grat. (Va.) 434; *Faulkner v. Faulkner*, 3 Leigh (Va.) 255, 23 Am. Dec. 264; *Hinkle v. Hinkle*, 34 W. Va. 142, 11 S. E. 993; *Naill v. Maurer*, 25 Md. 532. The Virginia cases are dicta.

⁵⁴ *White v. Wager*, 25 N. Y. 328.

⁵⁵ 2 Min. Insts. 160; 2 Scribner, Dower, 253.

⁵⁶ 2 Min. Insts. 160; 2 Scribner, Dower, 253; *Land v. Shipp*, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560; *Jones v. Powell*, 6 Johns. Ch. (N. Y.) 194, 200; *Warfield v. Castleman*, 5 T. B. Mon. (Ky.) 517; *Reed v. Morrison*, 12 Serg. & R. (Pa.) 18; *Camden Mut. Ins. Ass'n v. Jones*, 23 N. J. Eq. 171; *Shotwell v. Sedam*, 3 Ohio, 5.

ance, since she cannot claim dower out of them without partially defeating such lease, she is estopped to claim her dower.⁵⁷ But if the interest be conveyed to the wife by the husband before his death, while she is non sui juris, and is inconsistent with her claim of dower, this shows that it is intended to be in lieu of her dower, and in equity upon general principles would put her to her election between the provision and dower.⁵⁸

(3) Occasionally, also, the widow may be estopped to claim dower by reason of her covenants, as where, after the husband's death, she conveys his lands with covenants of warranty, she is estopped from afterwards claiming dower against her grantees.⁵⁹ But if she thus conveys without covenants of warranty, the general rule is that the doctrine of estoppel does not apply.⁶⁰

(4) Fraudulent practices on the part of the wife, whereby persons are induced to purchase the husband's land, relying upon the wife's assurances that she waives her dower and will not claim it, constitute, it is in general held, another case of estoppel.⁶¹ And her standing by at the sale, and permitting the land to be sold free of dower without protest, though apprised of her rights, is calculated to deceive and defraud the purchaser, and to induce him to pay a

⁵⁷ 2 Scribner, Dower, 259; 1 Roper, Husb. and Wife, 462. And if she accepts a lease for a term of years in the whole of the husband's lands, which is not expressed to be in lieu of her dower therein, her dower right is suspended during the continuance of the leasehold interest. 2 Scribner, Dower, 259; Park, Dower, 214.

⁵⁸ 2 Min. Insts. 1005; 1 Jarman, Wills, 458; Gosling v. Warburton, 1 Cro. (Eliz.) 128; Boynton v. Boynton, 1 Bro. Ch. 445; Birmingham v. Kirwan, 2 Sch. & Lefr. 452.

⁵⁹ 2 Scribner, Dower, 261; Dundas v. Hitchcock, 12 How. 256, 13 L. Ed. 978; Elmendorf v. Lockwood, 57 N. Y. 322; Woodruff v. Cook, 2 Edw. Ch. (N. Y.) 259; Magee v. Mellon, 23 Miss. 585; Rosenthal v. Mayhugh, 33 Ohio St. 155; Johnson v. Van Velsor, 43 Mich. 208, 5 N. W. 265; Usher v. Richardson, 29 Me. 415. But see Marvin v. Smith, 46 N. Y. 571; Va. Code 1904, § 2502; Lewis v. Apperson, 103 Va. 628 et seq., 49 S. E. 978, 68 L. R. A. 867, 106 Am. St. Rep. 903.

⁶⁰ 2 Scribner, Dower, 262; Shurtz v. Thomas, 8 Pa. 359. See Wilcox v. Hubbard, 4 Munf. (Va.) 346. She may also at common law be estopped where her ancestor has conveyed the land in question to her husband with covenants of title, binding upon the grantor and his heirs (of whom she is one)—at least as against the husband's alienee. Torrey v. Minor, 1 Smedes & M. Ch. (Miss.) 489; 2 Scribner, Dower, 264; 1 Washburn, Real Prop. 265, 266. See Russ v. Perry, 49 N. H. 547; Bates v. Norcross, 14 Pick. (Mass.) 224; Julian v. Boston, C., F. & N. B. R. Co., 128 Mass. 555.

⁶¹ 2 Scribner, Dower, 266 et seq.; Dougrey v. Topping, 4 Paige (N. Y.) 94; Wood v. Seely, 32 N. Y. 105; Smiley v. Wright, 2 Ohio, 506; Sweaney v. Malory, 62 Mo. 485; Connolly v. Brantsler, 3 Bush (Ky.) 702, 96 Am. Dec. 278; Stoney v. Bank of Charleston, 1 Rich. Eq. (S. C.) 275. But see Kelso's Appeal, 102 Pa. 7.

larger amount for the property than he might otherwise give. Such conduct, it seems, suffices to estop her from claiming dower in the property.⁶² But if the wife has done nothing to mislead the purchaser, and the circumstances are such that she is not required by good faith to disclose her claim, her mere silence in regard to it does not affect her right.⁶³

§ 296. VI. *Commuted Value of Contingent Dower Interest.* A dower right which has become vested by the husband's death may be valued without great difficulty, like any other life estate, by reference to approved mortality tables, thus ascertaining the probable duration of the widow's life (corrected by reference to the peculiarities of her constitution, the climate in which and the conditions under which she lives, etc.).⁶⁴

The problem of estimating the present commuted value in money of the wife's contingent dower interest during the coverture is much more difficult, because it not only involves a computation of the probable duration of a single life, but also of the chances of survival as between the husband and wife. But, with the aid of the tables of longevity and the calculus of chances, tables have been made, exhibiting the present value in cash of the contingent dower right of a married woman for every hundred dollars worth of her husband's estate whereof she is dowable for all probable ages of both parties.⁶⁵ The wife's expectation of life being thus determined, as well as that of the joint lives of the husband and wife, the present value of the contingent dower is ascertained by deducting from the present value of an annuity (the equivalent of one-third of the annual rents and profits of the land) payable during the wife's life the present value of the same annuity payable during the joint lives of husband and wife.⁶⁶

⁶² *Heth v. Cocke*, 1 Rand. (Va.) 344. See *Moore v. Tisdale*, 5 B. Mon. (Ky.) 352, 358; *Jefferies v. Allen*, 34 S. C. 189, 13 S. E. 365.

⁶³ 2 Scribner, *Dower*, 271; *Motley v. Motley*, 53 Neb. 375, 73 N. W. 738, 68 Am. St. Rep. 608; *Sip v. Lawback*, 17 N. J. Law, 442; *Lawrence v. Brown*, 5 N. Y. 394, 401; *Owen v. Slatler*, 26 Ala. 547, 62 Am. Dec. 745; *Edmundson v. Montague*, 14 Ala. 370.

⁶⁴ Ante, § 204; 2 Min. Insts. 143.

⁶⁵ For extensive tables of this description, see 2 Scribner, *Dower*, Appendix; 3 Va. Law Reg. 69 et seq.; 2 Min. Insts. 183; *Wilson v. Davisson*, 2 Rob. (Va.) 384.

⁶⁶ *Strayer v. Long*, 86 Va. 557, 563, 10 S. E. 574. These computations, however, it will be observed, only affect to find the average results in a vast number of cases, and are liable to be greatly disturbed in any one or a few cases by peculiarities of constitution, locality, occupation, habits of life, and other circumstances, to which therefor reference must be had wherever a practical result is sought. The extent to which the average estimates ought to be changed by these peculiar circumstances is not susceptible of definition, but must

§ 297. **Dower Consummate—Discussion Outlined.** The wife's dower, which is contingent or inchoate during the coverture, becomes consummate upon the death of the husband and the assignment to the widow of her dower. It is the assignment that finally creates her a tenant of the land in severalty for her life. Hence the discussion of this, the last great head of dower, revolves around the assignment of the widow's dower. We shall consider the following topics: (1) The conversion of dower inchoate (or contingent) into dower consummate by the husband's death and the assignment of the dower; (2) the rights and duties of the widow before assignment; (3) the assignment of dower; and (4) the rights and duties of the widow after the assignment of dower.

§ 298. **I. Inchoate Dower Converted into Dower Consummate.** The right of dower, which, before the husband's death, is merely inchoate and contingent upon the wife's surviving the husband, becomes consummate and vested upon the husband's death. Even then, however, it does not become an estate, but is merely a right of action until the land which she is to take as dowress has been actually set apart and assigned her as her dower. Until her dower has been thus set apart for her by metes and bounds, or by some arrangement which will secure to her the beneficial enjoyment of the dower right, she is entitled only to an undivided one-third interest in the lands whereof she is dowable, and a right to sue for the same if it be illegally withheld from her,⁶⁷ but not to a right of entry because the limits and boundaries of her part of the land are not marked out until the assignment.⁶⁸

§ 299. **II. Widow's Rights and Duties before Assignment of Dower—1. In General.** The widow's dower right, prior to assignment, being nothing more than a mere right of action, and not an estate, it follows that the same common-law principle which forbids the assignment of choses in action and rights of entry prohibits the widow to convey her dower right before assignment to another, so as to allow the latter to sue therefor in his own name—at least in a

depend upon the exercise of a sound discriminating judgment. 2 Min. Insts. 183; *Shelley v. Nash*, 3 Madd. 232; *Earl of Portmore v. Taylor*, 4 Sim. 182.

⁶⁷ 1 Washburn, Real Prop. 313; 2 Scribner, Dower, 25 et seq.; 1 Tiffany, Real Prop. § 198; *Aikman v. Harsell*, 98 N. Y. 186; *Sheafe v. O'Neil*, 9 Mass. 9; *Wade v. Miller*, 32 N. J. Law, 296; *Saltmarsh v. Smith*, 32 Ala. 404; *Shields v. Batts*, 5 J. J. Marsh. (Ky.) 12; *Best v. Jenks*, 123 Ill. 447, 15 N. E. 173; *Weaver v. Sturtevant*, 12 R. I. 537; *Rayner v. Lee*, 20 Mich. 384; *Stewart v. Chadwick*, 8 Iowa, 463.

⁶⁸ *Hildreth v. Thompson*, 16 Mass. 191; *Evans' Lessee v. Webb*, 1 Yeates (Pa.) 424, 1 Am. Dec. 308; *Hilleary v. Hilleary*, 26 Md. 274; *Heisen v. Heisen*, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434; *Johnson v. Shields*, 32 Me. 424.

court of law.⁶⁹ But in equity the widow's assignee is in general fully protected and allowed to sue for the right assigned him in that forum in his own name.⁷⁰ Even at common law there was never any difficulty about the widow's ability to release her dower right to a tenant of the freehold.⁷¹

For the same reason, namely, that the widow before assignment has a mere right of action, the dower right cannot in a court of law be subjected to her debts, even where interests in land may generally be so subjected.⁷²

So, also, since at common law the widow before assignment has no right of entry or of action in any particular portion of the land, her rights are not affected by a statute of limitations barring entry upon or action for land after a certain number of years. In other words, the possession of the heir, devisee or alienee of the land is not in such case adverse to her, and the statute of limitations does not apply.⁷³ Since, however, the wife has no right of action until the husband's death, no possession can begin to run against her before that date, and hence no disseisin of her husband during the coverture, however long continued, can affect her right to dower if she proceeds within the statutory period after her husband's death.⁷⁴

⁶⁹ 1 Washburn, Real Prop. 313, 314; 2 Scribner, Dower, 42 et seq.; Leavitt v. Lamprey, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; Jackson v. Aspell, 20 Johns. (N. Y.) 411; Ritchie v. Putnam, 13 Wend. (N. Y.) 524; Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; Carnall v. Wilson, 21 Ark. 62, 76 Am. Dec. 351; Saltmarsh v. Smith, 32 Ala. 404; Tucker v. Vance, 2 A. K. Marsh. (Ky.) 458; Hart v. Burch, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371. Some of the cases allow the assignee of the widow's claim to sue in a court of law in the name of the widow. McMahon v. Gray, 150 Mass. 291, 22 N. E. 923, 5 L. R. A. 748, 15 Am. St. Rep. 202; Lamar v. Scott, 4 Rich. Law (S. C.) 516; Robie v. Flanders, 33 N. H. 524.

⁷⁰ 2 Scribner, Dower, 45; Mutual Life Ins. Co. v. Shipman, 119 N. Y. 324, 24 N. E. 177; Strong v. Clem, 12 Ind. 37, 74 Am. Dec. 200; Potter v. Everitt, 42 N. C. 152.

⁷¹ 2 Scribner, Dower, 314; Elmendorf v. Lockwood, 57 N. Y. 322; Saunders v. Blythe, 112 Mo. 1, 20 S. W. 319; Carnall v. Wilson, 21 Ark. 62, 76 Am. Dec. 351; Sloniger v. Sloniger, 161 Ill. 270, 43 N. E. 1111.

⁷² 2 Scribner, Dower, 39; Rausch v. Moore, 48 Iowa, 611, 30 Am. Rep. 412; Aikman v. Harsell, 98 N. Y. 186; Shields v. Batts, 5 J. J. Marsh. (Ky.) 12.

⁷³ 1 Washburn, Real Prop. 313; 4 Kent, Com. 70; Parker v. Obear, 7 Metc. (Mass.) 24; Spencer v. Weston, 18 N. C. 213; Guthrie v. Owen, 10 Yerg. (Tenn.) 339; Miller v. Pence, 132 Ill. 151, 23 N. E. 1030; Sellman v. Bowen, 8 Gill & J. (Md.) 50, 29 Am. Dec. 524; Barnard v. Edwards, 4 N. H. 107, 17 Am. Dec. 403. But see Kinsolving v. Pierce, 18 B. Mon. (Ky.) 782; Conover v. Wright, 6 N. J. Eq. 613, 47 Am. Dec. 213; Care v. Keller, 77 Pa. 487.

⁷⁴ Williams v. Williams, 89 Ky. 381, 12 S. W. 760, 6 L. R. A. 637; Farmer

On the other hand, if the widow is in possession of the land, together with an heir, even without any actual assignment of dower, her possession is in privity with the heirs or devisees of the husband, and not adverse to them, unless she asserts a superior title so open, notorious and continuous as will fully and clearly show the altered character of her possession and knowledge of such change on the part of the adverse claimants.⁷⁵

§ 300. **Same—2. The Widow's Quarantine.** By the original common law, the widow had no right, prior to the assignment of her dower, to enter upon the husband's lands nor to retain possession thereof, nor even to remain in his mansion house an hour after his death. From that moment, if she continued to reside there, it was merely by the sufferance of the heir.⁷⁶

But by *Magna Charta*, 9 Hen. III, c. 7 (A. D. 1225), the widow was authorized to remain forty days (quarantine) in the deceased husband's chief mansion house, within which time dower must be assigned her, and meantime she was to have reasonable estover, or support in food and clothing, out of the estate. "But of little effect," says Lord Coke, "was this statute, for that no penalty was provided if it was not done."⁷⁷

The authorities are agreed that the right of quarantine belongs to the widow only so long as she remains a widow, so that if she marries again she forfeits it and must fall back upon her dower rights at common law.⁷⁸

A question has also been made as to whether the quarantine is an estate of freehold or only an estate at will. While some of the courts have regarded it as a freehold on the ground that it may endure during the wife's lifetime,⁷⁹ the better opinion is that it is analogous to an estate at will, since the heir, devisee or alienee may at any time assign dower and thus put an end to the widow's pos-

v. Ray, 42 Ala. 125, 94 Am. Dec. 633; Hart v. McCollum, 28 Ga. 478; Miller v. Pence, 132 Ill. 151, 23 N. E. 1030; Moore v. Frost, 3 N. H. 126.

⁷⁵ Hulvey v. Hulvey, 92 Va. 185, 186, 23 S. E. 233.

⁷⁶ 2 Min. Insts. 157; 1 Th. Co. Lit. 584, note (Q); Gilbert, Tenures, 26.

⁷⁷ 2 Min. Insts. 158; 1 Th. Co. Lit. 584; 1 Lom. Dig. 109; Simmons v. Lyle, 32 Grat. (Va.) 752, 755; Fisk v. Cushman, 6 Cush. (Mass.) 20, 52 Am. Dec. 761; Carnall v. Wilson, 21 Ark. 62, 76 Am. Dec. 351. There was speedily a demand for additional legislation; and accordingly by the statute of Merton (20 Hen. III, c. 1), the widow was allowed to recover damages in her writ of dower unde nihil habet from the time of her husband's death, provided the husband died seised. 2 Min. Insts. 158; 1 Th. Co. Lit. 584, 585, notes (45), (R) & (S).

⁷⁸ 2 Min. Insts. 158; 1 Th. Co. Lit. 584; Bac. Abr. Dower, (B) 1.

⁷⁹ Ackerman v. Shelp, 8 N. J. Law, 125; Craige v. Morris, 25 N. J. Eq. 467. See, also, 4 Kent, Com. 62.

session, and it is of too precarious a nature to be classed as a freehold.⁸⁰

The statute gives no quarantine except where the husband has a mansion house wherein the widow may remain. Hence if during the coverture the couple have resided in a house not belonging to the husband, the mere fact that he owns lands adjacent does not suffice for the operation of the statute.⁸¹ And if at the husband's death a third person is occupying the house under a title which would debar the widow from taking possession thereof immediately, as where it is occupied by a tenant under a lease from the husband and wife extending beyond the husband's lifetime, she cannot take advantage of the statute.⁸²

Nor is the widow bound, it seems, to occupy the premises in person. She may, it has been held, rent them to a third person.⁸³ And whether her occupancy of the mansion be in person or by a tenant, her possession begins in privity with the husband's heirs or devisees, and not adverse to them, though it may become adverse if she notoriously, openly and continuously claims the possession under a superior title.⁸⁴

§ 301. Same—3. Relative Priorities as between Dower and Husband's Debts—A. Debts Contracted before Marriage. If the debts are contracted by the husband before the coverture, and are not charged specifically upon the land by lien or incumbrance, such as a mortgage, deed of trust, vendor's or mechanic's lien, judgment, etc., the claim of the widow to dower is paramount.⁸⁵

If the debts have been before the marriage specifically charged upon the land, by way of mortgage, attachment or other lien, they take priority over the wife's dower, which only attaches after the coverture begins.⁸⁶ If the lien is created on the very day upon which the marriage occurs, though at an earlier hour, it will nevertheless be postponed to the dower, since the law knows no fraction of a day and favors dower.⁸⁷ And the fact that the lien, though

⁸⁰ *Simmons v. Lyle*, 32 Grat. (Va.) 752, 757. See, also, *Weaver v. Crenshaw*, 6 Ala. 873; *Inge v. Murphy*, 14 Ala. 289; *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153. Hence the widow is not liable for the taxes under a statute providing that the taxes shall be charged against the tenant of the freehold. *Simmons v. Lyle*, supra.

⁸¹ *McKaig v. McKaig*, 50 N. J. Eq. 325, 25 Atl. 181.

⁸² *Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 462.

⁸³ *Carnall v. Wilson*, 21 Ark. 62, 76 Am. Dec. 351; *Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 462.

⁸⁴ *Hannon v. Hounihan*, 85 Va. 437, 12 S. E. 157; *Hulvey v. Hulvey*, 92 Va. 185, 23 S. E. 233.

⁸⁵ 2 Min. Insts. 182; 1 Th. Co. Lit. 568, note (B).

⁸⁶ 2 Min. Insts. 180, 181.

⁸⁷ 2 Min. Insts. 181; 1 Washburn, Real Prop. 217; *Robinson v. Shacklett*, 29

created prior to the coverture, is not recorded until afterwards, would seem to be immaterial, since the recordation is required only as against creditors of the husband and purchasers from him, and the widow in her claim of dower is neither the one nor the other.⁸⁸

And where the debts are of the husband's own contracting, and he has received the benefit of the money thus raised, as between the dowress and the other representatives of the husband after his death (that is, his personal representative, heir or devisee), the dowress is entitled to have the incumbrances thus created by the husband satisfied out of the personalty in the hands of the personal representative, or out of the lands in the hands of the husband's heirs or devisees.⁸⁹

But if the debts are not of the husband's contracting, as where the lands come to him before or during the coverture already incumbered, the widow must take her dower cum onere; for the husband's personal and general estate is not liable for the debts of other persons, and in the instance supposed is not bound to exonerate the wife's dower from incumbrances charged upon it by others than the husband himself.⁹⁰ In such case, however, the widow may be endowed of the land, subject to the incumbrances, which would imply that she must keep down the interest on her third. But when the debt falls due, since the incumbrancer is not bound to accept his debt in parcels, he may demand that the widow shall pay the whole principal or else submit to a foreclosure in respect of the whole property; and if she pays the whole accordingly, she may compel the heir, devisee or other person interested in the remaining two-thirds to contribute pro rata.⁹¹

Grat. (Va.) 99; *Robbins v. Robbins*, 8 Blackf. (Ind.) 174; *Trustees of Poor of Queen Anne's County v. Pratt*, 10 Md. 5; *Ingram v. Morris*, 4 Har. (Del.) 111.

⁸⁸ See *Hoy v. Varner*, 100 Va. 605, 42 S. E. 690. But if she takes jointure in lieu of dower, she is a purchaser for value even though she take by will, and while it is liable for her husband's debts it is only so liable after the other property of the husband is exhausted. *Gaw v. Huffman*, 12 Grat. (Va.) 628; *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Taylor's Estate*, 175 Pa. 60, 34 Atl. 307.

⁸⁹ 2 Min. Insts. 142, 181; 1 Th. Co. Lit. 568, note (B); *Heth v. Cocke*, 1 Rand. (Va.) 344.

⁹⁰ 2 Min. Insts. 181; 1 Bright, Husb. and Wife, 388.

⁹¹ 2 Min. Insts. 181; 1 Bright, Husb. and Wife, 344, 387; *Gibson v. Crehore*, 3 Pick. (Mass.) 475, 5 Pick. 146; *McCabe v. Bellows*, 7 Gray (Mass.) 148, 66 Am. Dec. 467. See ante, § 203. By parity of reason, if the wife's separate estate becomes charged with the debt of the husband himself, his estate is to exonerate hers; but it is not so if the debt were not originally the husband's, as where the wife received her separate property charged therewith, and the husband promises to pay it. Here the wife's separate property is

§ 302. Same—B. Priorities as between Dower and Husband's Debts Contracted after Marriage. If not specifically charged upon the husband's land by mortgage, deed of trust, judgment, or attachment, or by a vendor's or mechanic's lien, or otherwise, the debts of the husband are always inferior to the wife's dower. It is immaterial whether the debts are contracted before or after the marriage.

If the husband's debts contracted after marriage are specifically charged upon the land, they are paramount to the widow's dower in two cases only, namely: (1) Where the wife has assented to the incumbrance by uniting with her husband in executing it; and (2) where the land comes to the husband already charged with the lien or incumbrance.

(1) If the wife unites with the husband in placing a mortgage or deed of trust upon the husband's property to secure a debt, she thereby pro tanto releases her dower interest in favor of the mortgagee or deed of trust creditor, and subordinates her dower to his debt. Thenceforth she is entitled to dower only in the equity of redemption—that is, in the surplus remaining after satisfying the mortgage (it being immaterial whether the mortgage be foreclosed in the husband's lifetime or after his death)⁹²—unless the husband in his lifetime, or a purchaser from him under agreement to assume the mortgage, pays the debt, in which case her full dower right is revived, though it is otherwise if the purchaser voluntarily pays it.⁹³

But if the wife does not unite in the mortgage or deed of trust, the fact that she consents to the incumbrance in some other way (unless sufficient to estop her),⁹⁴ or that she does not assent thereto at all, does not defeat her dower as against the incumbrancer.⁹⁵

(2) If the land comes to the husband already charged with a lien, such as a judgment, attachment, vendor's or mechanic's lien, or

primarily liable, and not the husband's estate. 2 Min. Insts. 181; 1 Bright, *Husb. and Wife*, 270 et seq.

⁹²Ante, § 263; *Land v. Shipp*, 100 Va. 337, 41 S. E. 742; *Hoy v. Varner*, 100 Va. 600, 42 S. E. 690.

⁹³Ante, § 263; *James v. Upton*, 96 Va. 296, 31 S. E. 255; *Land v. Shipp*, 100 Va. 337, 41 S. E. 742; *McCabe v. Swap*, 14 Allen (Mass.) 188; *Strong v. Converse*, 8 Allen 557, 85 Am. Dec. 732; *Everson v. McMullen*, 113 N. Y. 293, 21 N. E. 52, 4 L. R. A. 118, 10 Am. St. Rep. 445; *Selb v. Montague*, 102 Ill. 446; *Pollard v. Noyes*, 60 N. H. 184; *Carter v. Goodwin*, 3 Ohio St. 75; *Hatch v. Palmer*, 58 Me. 271; 1 *Tiffany*, *Real Prop.* § 184.

⁹⁴*Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978, 106 Am. St. Rep. 903, 68 L. R. A. 867.

⁹⁵*Picklin v. Rixey*, 89 Va. 832, 17 S. E. 325, 37 Am. St. Rep. 891; *Walsh v. Wilson*, 130 Mass. 124; *Merchants' Bank v. Thomson*, 55 N. Y. 7; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Davis v. Townsend*, 32 S. C. 112, 10 S. E. 837.

a mortgage or deed of trust, the lien or incumbrance is paramount to the wife's dower, and she is therefore entitled to dower in the surplus only, unless the incumbrance is discharged by the husband in his lifetime, or by a purchaser of the land who has bound himself to assume the payment of the lien debt as a part of the purchase money, or by the husband's administrator after his death, in which cases the wife's dower right in the land revives.⁹⁶

It will be remembered, also, in this connection, that one who purchases land, and as a part of the same transaction, though subsequently, executes a mortgage or deed of trust upon the land conveyed to secure the purchase money, is regarded as having received the land already subject to the lien, and hence, the incumbrance being paramount to the widow's dower already, it is not necessary that she should unite in executing it.⁹⁷

§ 303. III. The Assignment of Dower.—(I) Valuation of Lands Whereof Widow Is Dowable as against Husband's Heir or Devisee. When dower comes to be assigned to the widow, she is entitled to have set apart one-third in productive value of her husband's lands whereof she is dowable, not merely one-third in quantity, so that it is necessary to assign to her such portion of the husband's lands as may give her one-third of the annual income or profits of the entire estate, of which she is dowable.⁹⁸

If the husband dies seised of the lands wherein the dower is claimed, so that the widow seeks an assignment or recovery of her dower from her husband's heir or devisee, the rule is universal that she is entitled to one-third in value, as estimated at the time of such assignment or recovery.⁹⁹

Hence if the land, after the husband's death, appreciates in value from natural causes, or if the heir improves it, as by planting crops or building houses thereon, such enhanced value accrues to the widow's benefit when her dower is assigned her. It is the heir's own folly or liberality if he makes such improvements before the

⁹⁶ *Iaeger v. Bossieux*, 15 Grat. (Va.) 83, 76 Am. Dec. 189; *Coates v. Cheever*, 1 Cow. (N. Y.) 460; *Bullard v. Bowers*, 10 N. H. 500; *Hatch v. Palmer*, 58 Me. 271.

⁹⁷ *Ante*, § 245; *Hurst v. Dulaney*, 87 Va. 444, 12 S. E. 800.

⁹⁸ 1 Washburn, Real Prop. 297, 298; *Fuller v. Conrad*, 94 Va. 233, 26 S. E. 575; *Leonard v. Leonard*, 4 Mass. 533; *Smith v. Smith*, 5 Dana (Ky.) 179; *McDaniel v. McDaniel*, 25 N. C. 61.

⁹⁹ 2 Min. Insts. 157; 1 Washburn, Real Prop. 298; 1 Tiffany, Real Prop. § 200; 2 Scribner, Dower, 595; *Tod v. Baylor*, 4 Leigh (Va.) 498; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Parker v. Parker*, 17 Pick. (Mass.) 236; *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason, 347, 368, et seq., Fed. Cas. No. 11,356; *Thompson v. Morrow*, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 358; *Husted's Appeal*, 34 Conn. 488; *Hale v. James*, 6 Johns. Ch. (N. Y.) 258.

widow's dower is assigned.¹ And so it is, also, if the land depreciates in value, from natural causes at least, the widow must bear her proportion of the loss.²

§ 304. (II) Valuation of Dower Lands as against Husband's Alienee. If the husband has conveyed the land during the coverture, without uniting the wife in the conveyance, or the wife's dower is otherwise paramount to the title of the alienee, of whom an assignment or recovery of her dower is sought by the widow, there is a difference between the English and the American view of the valuation of the dower interest.

In England the rule seems to be the same against the alienee as against the heir or devisee of the husband, namely, that the land is in all cases to be valued as at the time of the assignment or recovery of the dower, not as of the date of the purchase by the alienee, and hence that the widow gets the benefit of all improvements placed upon the land by the alienee, even during the husband's life, as well as of the enhancement of value arising from natural causes.³

On the other hand, the general doctrine in the United States seems to be that while the wife takes her dower from the alienee valued, as in England, at the time of assignment or recovery, provided the enhancement of value accrues from extraneous or natural causes,⁴ yet an increase in the value of the land due entirely to the

10 Am. Dec. 328; *McGehee v. McGehee*, 42 Miss. 747; *Price v. Hobbs*, 47 Md. 386; *McClanahan v. Porter*, 10 Mo. 746.

¹ 1 Washburn, Real Prop. 298; 2 Scribner, Dower, 595; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Thompson v. Morrow*, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 358; *Parker v. Parker*, 17 Pick. (Mass.) 236; *Hale v. James*, 6 Johns. Ch. (N. Y.) 258, 260, 10 Am. Dec. 328; *Ralston v. Ralston*, 3 G. Greene (Iowa) 533.

² 1 Washburn, Real Prop. 298; 2 Scribner, Dower, 598; *Hale v. James*, 6 Johns. Ch. (N. Y.) 258, 260, 10 Am. Dec. 328; *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason, 347, 368, Fed. Cas. No. 11,356; *Campbell v. Murphy*, 55 N. C. 357, 362; *Sanders v. McMillian*, 98 Ala. 144, 11 South. 750, 39 Am. St. Rep. 19, 25, 18 L. R. A. 425, note; *Westcott v. Campbell*, 11 R. I. 378. There is some question as to whether the widow is to lose by the diminution in the value of the land due to the waste of the heir or devisee himself. Mr. Washburn seems to think that such depreciation of value is not to be counted against the widow. 1 Washburn, Real Prop. 298. But see 1 Tiffany, Real Prop. § 200. In such case the widow is at least entitled to maintain an action for damages against the heir or devisee for her loss caused by his default. See 1 Washburn, Real Prop. 298; 1 Roper, Husb. and Wife, 349; *Sanders v. McMillian*, supra.

³ 2 Scribner, Dower, 604 et seq.; *Doe v. Gwinnell*, 1 Q. B. 682, 41 Eng. Com. Law, 728. But see 2 Min. Insts. 157.

⁴ 1 Washburn, Real Prop. 299, 300; *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason, 375, Fed. Cas. No. 11,356; *Braxton v. Coleman*, 5 Call (Va.)

alienee's improvements thereon, as by buildings, etc., will not be reckoned in the estimate,⁶ nor, it seems, will a depreciation of value due to waste committed by the alienee during the husband's lifetime, though it is otherwise if the waste is done after the husband's death.⁶

§ 305. (III) **To Whom Dower Is to Be Assigned.** Since independently of statute the dower right before assignment is, like a chose in action or right of entry, not assignable at law, it follows that no person can demand dower in a court of law save the widow herself. If she has assigned her interest, the better opinion is that her assignee may sue therefor in a court of equity in his own name; but in a court of law, if he can sue at all, he must sue in the name of his assignor (the widow).⁷

§ 306. (IV) **By Whom Dower Is to Be Assigned.** The assignment of dower is not necessarily a judicial act or proceeding, and may therefore be accomplished without the aid of a court or judicial officer, merely by arrangement between the widow and the tenant of the freehold.⁸ Nor need it, like a judicial act, be performed by a disinterested person. On the contrary, a person representing interests antagonistic to the widow, such as the husband's heir, devisee or alienee, is authorized to assign her dower, and this at common law even though he be an infant.⁹

But quite generally in the United States, if the tenant of the freehold is an infant, the power to assign the widow her dower is vested in his guardian, or, if he be non compos, in his next friend.¹⁰

433, 2 Am. Dec. 592; *Sanders v. McMillian*, 98 Ala. 144, 11 South. 750, 39 Am. St. Rep. 19, 18 L. R. A. 425, note; *Thompson v. Morrow*, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 358; *Westcott v. Campbell*, 11 R. I. 378; *Boyd v. Carlton*, 69 Me. 200, 31 Am. Rep. 268; *McClanahan v. Porter*, 10 Mo. 750; *Dunseth v. Bank of United States*, 6 Ohio 77; *Smith v. Addleman*, 5 Blackf. (Ind.) 406; *Scammon v. Campbell*, 75 Ill. 223. But see *Tod v. Baylor*, 4 Leigh (Va.) 498; *Walker v. Schuyler*, 10 Wend. (N. Y.) 480.

⁶ *Braxton v. Coleman*, 5 Call (Va.) 433, 2 Am. Dec. 592; *Tod v. Baylor*, 4 Leigh (Va.) 498, 576; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Barney v. Frowner*, 9 Ala. 901; *Wooldridge v. Wilkins*, 3 How. (Miss.) 360; *Larowe v. Beam*, 10 Ohio, 498; and cases cited supra.

⁶ *Sanders v. McMillian*, 98 Ala. 144, 11 South. 750, 39 Am. St. Rep. 19, 18 L. R. A. 425.

⁷ Ante, § 299; *Pope v. Mead*, 99 N. Y. 201, 1 N. E. 671; *Payne v. Becker*, 87 N. Y. 153; *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200.

⁸ *Austin v. Smith*, 50 Me. 74, 79 Am. Dec. 597.

⁹ 2 Scribner, *Dower*, 78; *Moore v. Waller*, 2 Rand. (Va.) 418; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Young v. Tarbell*, 37 Me. 509; *McCormick v. Taylor*, 2 Ind. 336.

¹⁰ 2 Min. Insts. 159; *Miller v. Beverly*, 1 Hen. & M. (Va.) 372; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Robinson v. Miller*, 1 B. Mon. (Ky.) 88; *Young*

Indeed, the general rule is that whoever may be compelled, by adverse proceedings, to make or submit to an assignment of dower, may make such assignment voluntarily. It should therefore be assigned by a tenant of the freehold, whether the rightful tenant or not, and none can in general assign it unless he be a tenant of the freehold; dower being itself an estate of freehold. It is not sufficient that he have a leasehold or chattel interest.¹¹ But, on the other hand, it is not necessary that he be a rightful tenant of the freehold. Though he be a mere disseisor, the widow is not bound to wait for the assignment of her dower until the husband's heir or other person lawfully entitled recovers the seisin, provided she does not collude with the disseisor.¹² But an assignment of dower by a disseisor will only be supported to the extent that it would be if the heir himself had made the assignment.¹³

If there be joint tenants of the freehold, the right to assign dower is vested in either, since each is seised of the whole *per mie et per tout*, and the assignment made by either is obligatory upon his co-tenant.¹⁴

If an infant heir, or his guardian, assign too much dower to the widow, he may at full age have a "writ of admeasurement of dower"; but if the heir is an adult, and assigns too much, he is without remedy, in the absence of fraud.¹⁵

The widow's acceptance is essential to the binding effect of a voluntary assignment of her dower. She cannot be made to take less than her right by any *ex parte* act of the tenant of the freehold.¹⁶ And such acceptance estops her subsequently to deny her husband's title to the lands of which she has been thus endowed.¹⁷

§ 307. (V) **The Instrument of Assignment—Warranty.** For a valid voluntary assignment of dower the law does not require a deed nor even a writing, because the assignment is not a convey-

v. Tarbell, 37 Me. 509; *Boyers v. Newbanks*, 2 Ind. 388. But see *Bonner v. Peterson*, 44 Ill. 253.

¹¹ 2 Min. Insts. 158, 159; 2 Scribner, Dower, 75; 1 Th. Co. Lit. 591, note (Z), 606.

¹² 2 Min. Insts. 159; 2 Scribner, Dower, 76, 77.

¹³ 2 Scribner, Dower, 77.

¹⁴ 2 Scribner, Dower, 79. It would seem, however, to be otherwise as to tenants in common and coparceners, who are seised each of an undivided moiety only. See post, §§ 748, 766, 768.

¹⁵ 2 Min. Insts. 160; 2 Bl. Com. 136.

¹⁶ 2 Scribner, Dower, 71; *Austin v. Austin*, 50 Me. 74, 79 Am. Dec. 597. In this case the court says that, in order that a voluntary assignment of dower "bind the widow, it is necessary not only that the assignment be accepted, but she must also enter upon it."

¹⁷ *Perry v. Calhoun*, 8 Humph. (Tenn.) 551.

ance. It is sufficient if it be by parol, though, of course, it would be imprudent not to have a written memorial of the transaction. The dower, however, does not pass by the assignment, but by intendment of law as a continuation of the husband's estate.¹⁸

To every assignment of dower—at least, if it be made by the husband's heir—a warranty in law is annexed to the effect that the widow, if evicted by title paramount, shall recover in value, not according to that which she hath lost, but a third of the two remaining thirds of the lands whereof she is dowable, and doubtless, since the first assignment has failed, as of the value at reassignment.¹⁹

§ 308. (VI) **Conditional Assignment of Dower.** It is a principle of the common law that the assignment of dower to the widow must be absolute, unconditional, and without any exception or reservation in diminution of its value, any such condition being void and inoperative. The reason is that the widow comes to her dower “in the per” and not “in the post” (that is, by her husband's death, and not afterwards by any grant from the heir or terre tenant); that her estate is merely a continuation or prolongation of her husband's; and that the heir or terre-tenant is but a minister of the law to mark and set out her dower share,²⁰ and without authority to make any conditions.

But in equity such conditional assignment, if fair and just, and agreed to by the widow, is valid upon the equitable principles of estoppel and election.²¹

§ 309. (VII) **Dower Assignable Only Out of Dowable Lands.** It is another principle of the common law that dower may be assigned only out of lands (including buildings) of which the widow is dowable, or of a rent issuing out of such lands, if such an assignment be practicable. Else the assignment is no bar in a court of law to a recovery of dower anew, because a title to a freehold estate cannot be barred by a collateral satisfaction—a doctrine which, as we have seen, is controlled in equity, where such collateral satisfaction, if validly and fairly agreed to by the widow, will repel any subsequent claim on her part to dower.²²

But, in making the assignment, regard is to be had mutually to the rights of all parties concerned; and hence, if the husband has sold a portion of his land and dies seised of other land, her

¹⁸ 2 Min. Insts. 159; 2 Scribner, Dower, 73; 1 Th. Co. Lit. 592, note (A, 1).

¹⁹ 2 Min. Insts. 159.

²⁰ 2 Min. Insts. 160; 2 Scribner, Dower, 82; 1 Bright, Husb. and Wife, 379. See *Wentworth v. Wentworth*, 1 Cro. (Eliz.) 452.

²¹ 2 Min. Insts. 160; 2 Scribner, Dower, 82.

²² Ante, § 295; 2 Min. Insts. 160; 1 Lom. Dig. 114.

dower ought to be assigned out of the latter tract in exoneration of the land sold, provided, at least, that no injustice be thus done the widow.²³

For a like reason, if the lands of which the widow is dowable have been parcelled out among several alienees, the rights of these alienees should be protected as far as possible, and therefore dower should be assigned out of each separate tract, though but for these conveyances the widow might elect to receive an assignment of a single tract to be held in severalty in satisfaction of her dower in the whole.²⁴ Indeed, since the widow is to be endowed, as above shown, in the land remaining with the husband rather than in that aliened by him, wherever that can be done without injustice to the wife, it would seem that the first tract aliened ought to be exempted as far as possible and the dower taken out of the balance, and so with each tract aliened, and thus the lands be subjected to the widow's dower in the inverse order of their alienation, subjecting that of which the husband dies seised first of all. This is the rule adopted where lands subject to other incumbrances are aliened in parcels, and no reason is perceived why the same rule should not be applicable to dower.²⁵

§ 310. (VIII) Modes of Setting Apart Dower. The usual method of allotting dower, where practicable, is to set it apart in the lands of the husband by metes and bounds, although by mutual agreement an assignment by metes and bounds may be dispensed with.²⁶

But cases frequently arise where it is impossible or highly inconvenient or detrimental to the interests of all concerned to attempt an assignment by metes and bounds. In such cases some special mode of endowment may be adopted which will insure substantial justice to all parties, as by granting the widow a proportionate part of the rents and profits, or a right of alternate occupation and enjoyment.²⁷ For example, if the property be not susceptible of di-

²³ 2 Min. Insts. 160; 2 Scribner, Dower, 106; *Stimson v. Thorn*, 25 Grat. (Va.) 284. See *Wood v. Keyes*, 6 Paige (N. Y.) 478; *Lawson v. Morton*, 6 Dana (Ky.) 471.

²⁴ 2 Scribner, Dower, 603; *Thomas v. Hesse*, 34 Mo. 13, 84 Am. Dec. 66; *Fosdick v. Gooding*, 1 Greenl. (Me.) 30, 10 Am. Dec. 25; *Boyd v. Carlton*, 69 Me. 200, 31 Am. Rep. 268.

²⁵ See post, § 572.

²⁶ 2 Min. Insts. 159; 1 Th. Co. Lit. 592, note (B, 1); Bac. Abr. Dower (D) 1.

²⁷ *Park*, Dower, 252; *Stoughton v. Leigh*, 1 Taunt. 402; *Stevens v. Stevens*, 3 Dana (Ky.) 371; *Sanders v. McMillian*, 98 Ala. 144, 11 South. 750, 39 Am. St. Rep. 19, 18 L. R. A. 425; *Clift v. Clift*, 87 Tenn. 17, 9 S. W. 198, 360; *Chase's Case*, 1 Bland (Md.) 206, 17 Am. Dec. 277; *Rockwell v. Morgan*, 13 N. J. Eq. 389.

vision, as a mill, a franchise, a mine, etc., the widow is to be endowed in some special manner, so as to attain the substantial justice of the case as near as may be, as of every third toll dish, or for a third of the time, or of a third of the rents and profits, etc.²⁸

Or in any case a rent may be granted her, in lieu of her dower or of a portion thereof. But the rent granted must issue out of the lands whereof she is dowable; if not, it is not at law a bar to a further recovery of dower, though in equity, if she accepts it as such, and is *sui juris* and fully apprised of her rights, she will be estopped to claim dower.²⁹

Again, if the husband is seised as a tenant in common or coparcener, since the husband himself owns only an undivided share of the land, it is manifest that the widow cannot be endowed by metes and bounds. In the nature of the case she can only be endowed, as her husband was seised, of an undivided portion, which would constitute the widow a tenant in common with the husband's co-tenants for her life. Either tenant then may demand a partition of the land, so as to hold in severalty;³⁰ and the fact that the dowress is only tenant for life, while her co-tenants hold in fee simple, is no bar to a suit for partition.³¹

While the court, in assigning the widow her dower, as has been seen, may give her an annual rent granted issuing out of the lands of which she is dowable in lieu of her dower therein, or may give her one-third of the annual rents and profits of such land where it is impracticable to assign dower by metes and bounds, it cannot, without the widow's assent, assign her a gross sum of money in one payment as a satisfaction of her dower claim—at least, if it be possible to assign the dower otherwise.³²

§ 311. (IX) Compulsory Assignment of Dower.—1. Legal Process to Compel Assignment. At common law there were only two methods by which the widow might recover her dower: (1) The

²⁸ 2 Min. Insts. 159; 1 Th. Co. Lit. 581; *Stoughton v. Leigh*, 1 Taunt. 402; *Coates v. Cheever*, 1 Cow. (N. Y.) 460; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263.

²⁹ Ante, § 295; 2 Min. Insts. 159. 160; 1 Th. Co. Lit. 581.

³⁰ 2 Min. Insts. 159; 2 Scribner, Dower, 80; 1 Th. Co. Lit. 593, note (C, 1).

³¹ *Carneal v. Lynch*, 91 Va. 117, 20 S. E. 959.

³² *White v. White*, 16 Grat. (Va.) 264, 80 Am. Dec. 706; *Herbert v. Wren*, 7 Cr. 370; *Summers v. Donnell*, 7 Heisk. (Tenn.) 565; *Beavers v. Smith*, 11 Ala. 20; *Atkin v. Merrell*, 39 Ill. 62. See 2 Min. Insts. 164. When, with the consent of the parties, the court assigns a gross sum, it is measured by the present value of the widow's dower interest, which is computed, as in case of other life estates, by the aid of the statutory tables regulating the commutation of life interests. Ante, §§ 204, 296.

“writ of dower unde nihil habet”;³³ and (2) the “writ of right of dower.”³⁴

Both of these have long since given way in practice to the suit in equity for the recovery of dower. The courts of equity first assumed jurisdiction to assign dower in consequence of the obstacles which the widow encountered in the tedious common law actions—obstacles arising from the difficulty in ascertaining sometimes the precise lands of which she was dowable, sometimes the person to be sued, and the relative priorities of dowress, incumbrancers and alienees, etc. It has been an acknowledged branch of equity jurisdiction for more than a century, and there is now no need to allege any special ground of equitable intervention or that there is no adequate remedy at law.³⁵

The common-law action of ejectment did not lie for dower, because the widow before assignment of dower had not the right of entry, which was essential to that action.

§ 312. Same—2. How to Set Apart Dower upon Legal Process.

At common law the sheriff is to execute the judgment of the court in the writ of dower unde nihil habet, or the writ of right of dower, by assigning not only one-third of each tract, but a third of each species of land, as arable, meadow, pasture, wood, etc.³⁶

But in equity, and in the statutory remedy by action of ejectment, the assignment is made by commissioners; and in equity, at least, much more liberal modes of division are tolerated than would be countenanced at common law—the primary object being to give the widow one-third of the income arising from the estate, without injustice to others, rather than to give her one-third of the lands themselves; that is, one-third in value is to be assigned in such manner as shall best subserve the mutual convenience of the parties. This rule is adopted equally to protect the widow against having an unproductive part of the land assigned to her and to guard heirs or others from being left, during the widow's life, without means of support.³⁷

§ 313. Same—3. Damages Recovered in Suit for Dower. By the common law, since the tenant of the freehold, whether the hus-

³³ This was applicable in case no dower had as yet been assigned the widow out of the tract in which she now seeks dower. By the statute of Merton (20 Hen. III, c. 1) damages were also allowed to be recovered in this action, thus converting it from a real into a mixed action. 2 Min. Insts. 161.

³⁴ This was applicable to recover dower alone, without damages. 2 Min. Insts. 161.

³⁵ 2 Min. Insts. 161, 162; 1 Story, Eq. Jur. § 624 et seq.

³⁶ 2 Min. Insts. 163.

³⁷ 2 Min. Insts. 163, 164; Fuller v. Conrad, 94 Va. 233, 26 S. E. 575.

band's heir or his alienee, was entitled to the possession of the land, and to receive the rents and profits thereof until dower is assigned the widow either voluntarily or by judgment of the court, there could be no recovery by the widow of rents and profits during the time her dower was withheld.³⁸

But by the statute of Merton, 20 Hen. III, c. 1, the common-law rule was modified, and widows were allowed to recover damages in a writ of dower unde nihil habet,³⁹ the damages to consist of the "value of the whole dower to them belonging, from the death of their husbands until the date that the said widows, by judgment of our court, have recovered seisin of their dower."

This statute, however, applied only where the husband died seised, and was inapplicable as against the husband's alienee,⁴⁰ though upon a suit brought in equity against an alienee to recover the dower and for an account of rents and profits, it is customary, even in the absence of statute, to decree damages (so-called) from the time of the demand made upon the alienee to assign the dower and his refusal to do so, but not from the husband's death.⁴¹

§ 314. IV. Widow's Rights and Duties after Assignment of Dower. After assignment of her dower, the widow takes a freehold estate for her life, vested in possession, and in general the same rights and duties devolve upon her as upon any other tenant for life. But the estate, once created by the assignment, does not date from that time, but relates back to the death of the husband, and in contemplation of law is an estate in the widow from that event.⁴²

Since the widow's dower is a prolongation or continuation of the husband's seisin, she becomes liable to her due proportion (one-

³⁸ 2 Min. Insts. 161, 163; 1 Tiffany, Real Prop. § 201.

³⁹ See ante, § 311, and note 1; 2 Min. Insts. 161.

⁴⁰ 2 Min. Insts. 163; 1 Th. Co. Lit. 584, 585; Norton v. Norton, 94 Ala. 481, 10 South. 436; May v. May, 7 Fla. 207, 68 Am. Dec. 431; Shoot v. Galbreath, 128 Ill. 215, 21 N. E. 217; Sellman v. Bowen, 8 Gill & J. (Md.) 50, 29 Am. Dec. 524. By damages are to be understood, according to the English authorities, the profits of the third part of the estate since the death of the husband (after deducting proper expenditures), and such additional sum as will compensate the widow for any further loss she may have sustained by the detention of her dower. 2 Scribner, Dower, 704; Spiller v. Andrews, 8 Mod. 25; Walker v. Neville, 1 Leon. 56; Penrice v. Penrice, 2 Barnes, 191.

⁴¹ 2 Scribner, Dower, 709 et seq.; Sellman v. Bowen, 8 Gill & J. (Md.) 50, 29 Am. Dec. 524; Leavitt v. Lamprey, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; Whitaker v. Greer, 129 Mass. 417; Young v. Thrasher, 115 Mo. 222, 21 S. W. 1104. But in Kentucky the damages are to be reckoned only from the commencement of the suit. Garton v. Bates, 4 B. Mon. 366; Waters v. Gooch, 6 J. J. Marsh. 586, 22 Am. Dec. 108; Kendall v. Honey, 5 T. B. Mon. 283.

⁴² Ante, § 250; 2 Scribner, Dower, 772 et seq.

third) of all duties and services to which the estate was subject in his possession, and for such one-third she is answerable to the person entitled to claim them. Thus, upon a conveyance to the husband in fee simple, reserving a rent payable annually forever to the grantor and his heirs, the widow is entitled upon the husband's death to dower in the land, but she must during her life pay one-third of the rent annually accruing.⁴³ So, also, she is bound to pay her share (one-third) of the interest annually accruing upon liens or incumbrances upon the husband's land which are paramount to her dower, just as other life tenants must do.⁴⁴ And she cannot seek for reimbursement or exoneration for the outlay from the husband's heirs or personal representatives if the debt be not of the husband's contracting, but rested upon the land when he acquired it.⁴⁵ But if the debt were contracted by the husband himself, and the creditor's lien is paramount to the dower, the dowress is entitled to have the incumbrance cleared off out of the husband's personal estate in the hands of the husband's personal representative, and if that be insufficient out of the lands in the hands of the husband's heirs or devisees.⁴⁶ In this latter case, therefore, the widow is not called upon to contribute anything to pay the annual interest until the personalty and the other lands of which the husband dies seised are exhausted.⁴⁷

The principles just mentioned apply equally to the duty of the dowress with respect to contributing to pay off an incumbrance paramount to her dower, which falls due during her lifetime.⁴⁸ But if we suppose the widow to have paid off the incumbrance, and to be seeking contribution from the other estate of the husband, in a case in which she is entitled to it, the question arises, what is the proportion of the debt that ought to be paid by the widow? If she were entitled to one-third of the land in fee simple, she clearly ought to pay one-third of the debt. But she is only a life tenant of a third of the land, and as such bound to pay one-third of the annual interest, but not bound to pay an entire third of the principal. Her obligation in the matter of the payment of the principal of the debt is measured in the same way as in case of other life ten-

⁴³ 2 Min. Insts. 181, 182; 1 Th. Co. Lit. 568, note (2); 1 Bright, Husb. and Wife, 394, 395; Ascough's Case, 9 Co. 135 a, 135 b.

⁴⁴ Ante, § 203; 2 Min. Insts. 142.

⁴⁵ 2 Min. Insts. 142; 1 Th. Co. Lit. 576, note (25); 1 Bright, Husb. and Wife, 344, 387; Banks v. Sutton, 2 P. Wms. 716; ante, § 300.

⁴⁶ Ante, § 301; 2 Min. Insts. 142.

⁴⁷ 2 Min. Insts. 142, 143; 1 Th. Co. Lit. 568, note (B); 1 Bright, Husb. and Wife, 344, 387; Heth v. Cocke, 1 Rand. (Va.) 344.

⁴⁸ Ante, § 301; 2 Min. Insts. 142, 143.

ants, by estimating by means of the life tables her probable duration of life and aggregating the present values in cash at compound interest of all the annual interest payments she would have to make upon the debt if it remained unpaid during her lifetime.⁴⁹

If the land in which dower is assigned is subject to an existing lease for years, created before the coverture, or otherwise paramount to the wife's dower, the widow is dowable only of the reversion, and as a reversioner is entitled to her proportionate share of the rent.⁵⁰ If, however, the dower is paramount to the lease for years, she is then dowable of the land itself, and may oust the lessee pro tanto. The last proposition is also true if the lease be for life. But if the freehold lease be paramount to the wife's dower, because executed by the husband before marriage, the widow is dowable neither of the land (since the husband has not the seisin during the coverture) nor of the rent (since in that he has not an estate of inheritance).⁵¹ And, lastly, if the freehold lease be paramount to the dower by reason of the joinder of the wife therein, the wife's joinder defeats her dower only to the extent necessary to protect the rights of the lessee for life, so that, while the widow cannot claim dower in the land as against the lessee, she may claim dower in the reversion (of which her husband has been seised during the coverture of an estate of inheritance), and therefore be entitled to one-third of the rent, if any, paid by the life tenant, and to her third of the land itself after the life tenant's death.⁵²

In conclusion, it may be observed that if the husband has, before coverture, made a lease for years upon a condition subsequent, and dies before the lease expires, and after the assignment of dower the condition is broken, the better view is that the dowress cannot enter for the condition broken—not at common law, because at common law only the grantor or his heirs could enter for breach of condition;⁵³ and not under the statute 32 Hen. VIII, c. 34, for that statute only extends the right of entry for condition broken to the assignees of the reversion, that is, persons entitled to the reversion by act of purchase or by act of the parties, whereas the dowress is entitled thereto by act of the law.⁵⁴

⁴⁹Ante, § 203; 2 Min. Insts. 143, and note. See *Hoy v. Varner*, 100 Va. 600, 42 S. E. 690.

⁵⁰Ante, § 249; 2 Scribner, Dower, 776. See *Boyd v. Hunter*, 44 Ala. 705; *Weir v. Tate*, 39 N. C. 264.

⁵¹Ante, § 249; 2 Min. Insts. 151; *Houston v. Smith*, 88 N. C. 312.

⁵²See ante, § 269.

⁵³Post, §§ 297, 298; 2 Min. Insts. 273; 2 Scribner, Dower, 776.

⁵⁴See 2 Scribner, Dower, 776, 777.

CHAPTER XIV.

ESTATES FOR YEARS OR LEASEHOLD ESTATES.

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- 333. 5. Doctrine of Merger.
- 334. 6. Tenant's Rights to Exclusive Possession of Premises.

§ 315. **Origin and Nature of Estates for Years.** By the original feudal law no estate less than freehold was recognized as an interest in lands. If one held an estate for years only or at will, he held no interest in the land itself, but merely a right by way of contract, so that at any moment the contract might be broken by the lessor's eviction of the tenant, who would have no recourse save an action for damages for breach of the contract.¹ Hence estates for years were originally entirely precarious, at the arbitrary will of the giver, and were liable, even after they became more permanent, to be defeated by collusive recoveries suffered by the lessor; complete protection being afforded to the tenant against such recoveries only by the statute 21 Hen. VIII, c. 15.² But as early as

¹ 1 Washburn, Real Prop. 462, 463. "The possession of such tenants," says Mr. Washburn, "was esteemed of so little consequence that they were considered as bailiffs or servants of the lord, holding possession of the land *jure alieno* and not *jure proprio*, who were to receive and had contracted to account for the profits at a settled price, rather than as having any property of their own." 1 Washburn, Real Prop. 463. See 2 Min. Insts. 190.

² 2 Min. Insts. 190; Bracton, 27 b; 2 Bl. Com. 141, 142; 1 Th. Co. Lit. 628.

the reign of Edward III the tenant for years was permitted, by means of the writ of *ejectione firmæ* (and later by the action of *ejectment*) to recover possession of the land from which he had been evicted either by his lessor or by a stranger, thus giving him a direct interest in the land itself, which before he had not.³

For the reasons above given, estates for years were originally regarded as of little worth, and, being rather choses in action than freeholds, were held to pass upon the tenant's death to his personal representative, and not to his heir, nor might they in any way be made descendible to the heir; in short, such estates were, and are, regarded as belonging in almost all respects to the same general class as movable goods, being termed, like them, chattels, but distinguished from them as chattels real (expressive of their immobility).⁴

And so, for like reasons, a freehold estate cannot be derived from or carved out of a term for years, however long, any more than it might be created in a personal chattel, so that, if one possessed of a long term for years (say five hundred years) should give it to some one for his life, the estate for life would be only a chattel, not a freehold, interest. So, also, a rent, granted for life, issuing out of a long term for years, while a good charge as long as the term lasts, is only a chattel, because it issues out of a chattel interest.⁵

It will be seen, therefore, that, while in modern times a tenant for years, within the limits of his estate, has in most respects as full and perfect enjoyment of the land leased (albeit it is a mere chattel) as has a freeholder, there are still many traces of the original differences in nature and origin that once existed between them. Among the more important of these the following may be mentioned:

1. Estates for years are chattels real, and, upon the death of the owner intestate, go to his personal representative, and not to his heir, while a freehold estate, independently of statute, never goes to the owner's personal representative.

2. In former times, any interest whatever granted in or carved out of a chattel carried with it the whole property in the chattel, as is still the case upon a conveyance of a chattel to one and the heirs of his body (even in states which retain the estate tail in lands), so that there could be no reversion nor remainder in a chattel after a preceding estate therein, however small. And the same principle is applicable to estates for years (being chattels real), as

³ 1 Washburn, Real Prop. 464; 1 Tiffany, Real Prop. § 36.

⁴ 2 Min. Insts. 190, 197; 2 Bl. Com. 142, 386.

⁵ 2 Min. Insts. 197.

to any other chattel, while with respect to freehold estates in land the rule of the common law was very different.

Thus if A., owning land in fee simple, transfers it "to B. for life or for years, remainder to C. and his heirs," there is no difficulty at common law in recognizing the distinct interests of both B. and C. in the land; but if A. owns a diamond ring, or a term for three hundred years, and disposes of it as above, B. would in former times take the whole property, and C. would take nothing.⁶

A different doctrine, however (at first confined to wills, but now applicable to any conveyance), prevails in modern times, and it is now settled that a term for years, as well as any other chattel, may be limited to one for his life, the residue of the term to go upon his death to another.⁷

3. No estate less than a freehold is ever created by act of the law. Thus no estate can arise by descent (an act of the law), save an estate of inheritance in lands. So, also, estates by the curtesy and in dower, etc., are life estates.

4. Most of the duties imposed by the law upon owners of land are imposed upon the tenant of the freehold; the law ignoring him who has possession of the land for a term of years, however long.

§ 316. Definition of a Term for Years. An estate for years is one that is created by a contract or by estoppel, whereby the tenant is given the possession of lands or tenements, and enters upon the same for a period of time fixed or agreed upon by the parties.⁸

This definition calls for a consideration of three points, which will be discussed in the sections immediately following, namely: (1) The necessity for a fixed period of duration; (2) the necessity for entry; and (3) the modes of creating the estate.

§ 317. Fixed Period of Duration Necessary to an Estate for Years. It is the characteristic of a freehold estate that it is of uncertain and indeterminate duration. Just the reverse is true of a term for years. It must be of a certain, fixed duration, terminat-

⁶ 2 Min. Insts. 192.

⁷ 2 Min. Insts. 192. And by way of executory limitation it may be given over to any number of persons, whether in esse or ascertained or not, provided the future limitation must take effect, if at all, within a life or lives in being, and ten months (the period of gestation) and twenty-one years thereafter; that is, within the time demanded by the rule against perpetuities. 2 Min. Insts. 192, 193; 3 Th. Co. Lit. 296, note (D); 1 Washburn Real Prop. 468, 469; post, § 695. A covenant contained in a lease for its renewal indefinitely, at the option of the lessee, does not violate the rule against perpetuities, since there is no postponement of the possession, and will be enforced in equity. *Iggulden v. May*, 9 Ves. 925; *Boyle v. Peabody Heights Co.*, 46 Md. 623; *Blackmore v. Boardman*, 28 Mo. 420; *Page v. Esty*, 54 Me. 319.

⁸ See 1 Washburn, Real Prop. 465; 2 Min. Insts. 184; post, § 319 et seq.

ing on a day named or which may be named, though it is not necessary that it should endure for one or more years. It may expire at the end of one or more years, or months, or weeks, or at any intermediate period, if only it be definitely agreed that it cannot endure longer than a given date.⁹

But *id certum est quod certum reddi potest*. Hence, if one leases to another for as many years as J. S. shall name, it is a good lease for years.¹⁰ On the other hand, a lease for as many years as J. S. shall live does not create an estate for years but a freehold, which at common law required livery of seisin to perfect it. But a lease for one hundred years if J. S. shall so long live, or a lease to A. during B.'s minority, or until B. becomes twenty-one, or to endure for a certain time after the happening of a certain contingency (e. g., the payment of a sum by the lessee to the lessor), creates an estate of defined duration, and therefore an estate for years, though in the first case it may and probably will expire before the lapse of the hundred years, by the uncertain happening of the death of J. S., or in the second, though B. may not actually live till his twenty-first birthday, or in the third, the lessee may never pay the money to the lessor, or the time of payment is uncertain.¹¹

Upon the same principle it has been held that a lease for seven or fourteen years is good as an estate for seven years, and for fourteen as soon as the lessee shall so elect.¹² And if a lease be made "for one year, and so on from year to year," it constitutes an estate for two years certain, as does a lease "for years" fixing no particular number.¹³

Upon the same reasoning, an estate until the lessee may, out of the rents and profits, repay himself a certain sum of money, as in the case of a creditor in possession under the writ of *elegit*¹⁴ or otherwise, is a valid estate for years.¹⁵ And so, if a lease be made to one for a year, with a privilege of holding for three years, and the tenant continues to hold after the expiration of the first year, the duration of the term, before uncertain, becomes fixed by his election to hold for three years, unless, indeed, this election is to

⁹ 2 Min. Insts. 191; 2 Bl. Com. 143; 1 Th. Co. Lit. 628, 632.

¹⁰ 2 Min. Insts. 191.

¹¹ 2 Min. Insts. 191, 416; 1 Washburn, Real Prop. 471; 1 Tiffany, Real Prop. § 39; *Boraston's Case*, 3 Co. 20 a; *Bishop of Bath's Case*, 6 Co. 34 b; *Murray v. Cherrington*, 99 Mass. 229; *Western Transp. Co. v. Lansing*, 49 N. Y. 499; *Batchelder v. Dean*, 16 N. H. 265; *Reed v. Lewis*, 74 Ind. 433, 39 Am. Rep. 88.

¹² 2 Min. Insts. 754; *Doe v. Dixon*, 9 East, 15; *Ferguson v. Cornish*, 2 Burr 1034.

¹³ 1 Washburn, Real Prop. 471; *Denn v. Cartright*, 4 East, 29.

¹⁴ 2 Min. Insts. 303.

¹⁵ *Batchelder v. Dean*, 16 N. H. 265, 268; 2 Min. Insts. 303.

be indicated, by agreement, in some particular manner, as by notice, and the method is not pursued by the tenant.¹⁶

It may be observed, also, that if a lease for a fixed number of years contain a covenant of renewal at the option of the lessee, and the lessee elect to renew, the performance of the covenant by the lessor is not a new lease, but merely a fuller performance of the first.¹⁷ But a general covenant for "renewal" binds the lessor to renew for one term only, of equal duration with the first term, and if the tenant holds over without renewal he becomes a tenant from year to year.¹⁸

§ 318. Necessity for Entry to Consummate the Estate for Years. A lessee at common law does not become possessed of an estate for years by virtue of the lease alone. The common law also requires that he shall have entered upon the premises. Not until such entry does the lessee at common law acquire an estate in the land. Before that time he has mere right of entry.¹⁹ This bare right of entry is called his interest in the term, or *interesse termini*. When he (or if he be dead, his personal representative) has entered, he is at common law then, and not before, possessed of the estate or term (*terminus*); and the relation of landlord and tenant dates from that period.²⁰

In modern times, however—indeed, since the statute of uses (27 Hen. VIII, c. 10)—if the lease is by way of bargain and sale under that statute (as it usually is when the landlord is seised of a freehold), the constructive possession conferred by the statute itself, as will be more fully explained hereafter, supersedes the necessity for an actual entry on the lessee's part.²¹

¹⁶ 1 Washburn, Real Prop. 471; *Dix v. Atkins*, 130 Mass. 171; *Kramer v. Cook*, 7 Gray (Mass.) 550; *Clarke v. Merrill*, 51 N. H. 415; *Beller v. Robinson*, 50 Mich. 264, 15 N. W. 448. See *James v. Kibler*, 94 Va. 165, 26 S. E. 417, 3 Va. Law Reg. 444.

¹⁷ *House v. Burr*, 24 Barb. (N. Y.) 525; *Brown v. Parsons*, 22 Mich. 24. See *James v. Kibler*, 94 Va. 165, 26 S. E. 417, 3 Va. Law Reg. 444. If the landlord refuses to renew in accordance with his covenant, he may be compelled to do so in equity. *Iggulden v. May*, 9 Ves. 925; *Banks v. Haskie*, 45 Md. 207; ante, § 315.

¹⁸ *King v. Wilson*, 98 Va. 259, 35 S. E. 727; *Peirce v. Grice*, 92 Va. 763, 24 S. E. 392.

¹⁹ 2 Min. Insts. 191; 1 Th. Co. Lit. 628; 1 Washburn, Real Prop. 472; *James v. Kibler*, 94 Va. 165, 26 S. E. 417, 3 Va. Law Reg. 444.

²⁰ 2 Min. Insts. 191; 1 Washburn, Real Prop. 472; *James v. Kibler*, 94 Va. 165, 26 S. E. 417, 3 Va. Law Reg. 444. A privity of contract, though not of estate, is created by the mere agreement of the parties before entry, so that the lessee becomes immediately bound upon his covenants. 1 Washburn, Real Prop. 498. But an assignee of the *interesse termini* would not be.

²¹ Post, § 412; 1 Washburn, Real Prop. 473. But see *James v. Kibler*, 94 Va. 165, 26 S. E. 417, 3 Va. Law Reg. 444.

The word "term," therefore, does not merely signify the time specified in the lease, or the number of years it is to run, but also the estate itself. Hence the "term" (meaning estate) may expire during the continuance of the time, as where a tenant for two years surrenders or forfeits his estate at the end of the first year.²²

The tenant for years is not seised of the land, but only possessed of the term. There is, therefore, no ceremony (other than at common law the entry above mentioned) necessary to create it, corresponding to the livery of seisin deemed essential at common law to the creation of a freehold.²³

Contrasting the entry required for the creation of an estate for years with the livery of seisin necessary for a freehold, it may be observed that, while the latter usually called for the presence of both the grantor and grantee upon the premises, the entry of the lessee for years could be made in the absence of the lessor, or even after his death, and might be made by the personal representative of the lessee, or his assignee, after the latter's death.²⁴

§ 319. Modes of Creating Estates for Years. An estate for years may arise by means of (1) a conveyance known as a lease; (2) by a contract to lease in the future (in equity); and (3) by estoppel.

§ 320. Same—1. Estates for Years Created by Lease. A lease is one of the original common-law conveyances, and always supposes a reversion in the grantor.²⁵ It is an executed agreement by which the grantor (called the lessor) conveys to the grantee (called the lessee) any estate in the premises less than his own. It is the usual mode of creating an estate for years.²⁶

²² 2 Min. Insts. 191; 1 Washburn, Real Prop. 468. Lord Coke puts a case of a lease for twenty-one years and afterwards a second lease to begin "at the expiration of the term aforesaid of twenty-one years." If the first lessee surrenders his estate (thereby terminating it), the second lease takes effect at once; but, if the second lease is "from the expiration of the twenty-one years aforesaid," it must await the efflux of the whole time mentioned. Co. Lit. 45 b; Sheppard, Touchst. 274.

²³ 2 Min. Insts. 191.

²⁴ 2 Min. Insts. 191; 1 Washburn, Real Prop. 472; 1 Tiffany, Real Prop. § 38; 4 Kent, Com. 97; Whitney v. Allaire, 1 N. Y. 305.

²⁵ Post, § 967. A lease may also take effect under the statute of uses. Ante, § 318; post, §§ 412, 998, 1000.

²⁶ 2 Min. Insts. 750, 751; 2 Bl. Com. 317; 2 Th. Co. Lit. 403, note (A). If it pass the grantor's entire estate, it is not a lease, but an assignment. 2 Min. Insts. 751, 795. A lease is to be carefully distinguished from an executory contract to lease, which, while frequently approaching closely to an executed lease (especially where the possession under the lease is to commence at a future day), depends upon different principles. See post, § 321.

At common law, since even an estate of inheritance or of freehold did not require any writing for its creation, so a fortiori did not a lease for years, how long soever the term, nor did it require the livery of seisin so indispensable at common law to the creation of a freehold. The only safeguard and notoriety demanded by the common law in the case of the lease of land for years was the entry by the lessee already described.²⁷

The simple ceremonies of livery and entry might answer well enough for an unlettered people, who knew more of the sword than of the pen; nay, for such a people they were perhaps the best expedients that could have been devised. But as society has advanced to a higher plane of culture and refinement, written memorials of transactions and a public and general registry have been found to afford a far more efficient protection to the interests of the parties and of the public.²⁸

Accordingly, it was long ago provided in England by the statute of frauds, 29 Car. II, c. 3, §§ 1, 2, 3, that no estates of inheritance or of freehold, or for a term exceeding three years, shall be conveyed except by deed or writing.

And this enactment has been more or less closely imitated throughout the United States.

If, therefore, the estate conveyed does not exceed three years in England, or whatever the statutory period may be in one of the United States, it may be created as at common law by parol; that is, verbally.²⁹

If, despite the statute, it is attempted to lease by parol for a period greater than the statute permits, and the tenant takes possession by virtue of the lease, it does not operate to give him the estate agreed upon, for that would be to set the statute at naught; nor can the tenant be looked upon as a trespasser, since he is in possession by the owner's consent. The English statute of frauds expressly declares that the tenant shall in such case be regarded as a tenant at will; and in this country there is no doubt but that the same result follows upon general principles.³⁰ But, though the tenant's estate under such a void lease begins as an estate at will, it may be converted speedily into an estate from year to year upon the payment and acceptance of rent, as will appear hereafter.³¹

²⁷ Ante, § 318; 2 Min. Insts. 184; 1 Th. Co. Lit. 630, 631; 2 Bl. Com. 144. But no entry is required if the lease takes effect under the statute of uses. Ante, § 318.

²⁸ 2 Min. Insts. 184, 185.

²⁹ 2 Min. Insts. 185; 2 Th. Co. Lit. 404, note (A).

³⁰ 2 Min. Insts. 198; 1 Washburn, Real Prop. 622. See post, § 335.

³¹ Post, § 347; Clayton v. Blakey, 8 T. R. 3; Talamo v. Spitzmiller, 120

§ 321. **Same—2. Estate for Years Created (in Equity) by Executory Contract to Lease.** An executory contract to lease land is to be viewed from two standpoints: (1) The right of the lessee to bring an action for damages for the breach thereof; and (2) the right of the lessee to the possession of the land itself under such contract, which right, if the agreement be for a term exceeding five years and be not by deed (that is, under seal), will be recognized and enforced only in a court of equity. A consideration of the second topic necessarily involves more or less a consideration of the first also.

At common law an executory contract for the conveyance of an estate even of freehold, and a fortiori of a term for years, might have been by parol or verbal merely. But the same policy which wisely sought to prevent frauds and perjuries by requiring executed conveyances to be by deed or will has dictated, also, that executory contracts to convey or to lease for a term should be better authenticated than by the parol testimony of witnesses. Hence the English statute of frauds, 29 Car. II, c. 3, while providing in the first three sections for the conveyance or lease of land, provides in the fourth for executory contracts to convey or to lease, declaring substantially that no action shall lie to charge any person upon a contract for the sale of land or of any interest therein, unless the contract or some memorandum or note thereof be in writing, signed by the party to be charged thereby or his agent, duly authorized.

But some question has been made, in case of an oral contract for the lease of land for exactly one year, though the lease is to be executed the next day, whether an action thereon is not prohibited by another clause of the statute of frauds, namely, that declaring that no action shall lie upon a contract not to be performed within one year, unless it be in writing. The answer to this question depends upon the act that constitutes the performance of the contract to lease. If that act be the making of the lease (and upon its face it would appear to be so), and if under the terms of the contract the lease is to be executed within one year, or even if it may be executed within one year, the statute does not apply.³² This

N. Y. 37, 23 N. E. 980, 8 L. R. A. 221, 17 Am. St. Rep. 607; *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616; *Dunn v. Rothermel*, 112 Pa. 272, 3 Atl. 800; *Barlow v. Wainwright*, 22 Vt. 88, 53 Am. Dec. 79; *Scully v. Murray*, 34 Mo. 420, 86 Am. Dec. 116; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 24 Am. St. Rep. 146.

³² *Donellan v. Read*, 3 B. & Ad. 809; *Becar v. Flues*, 64 N. Y. 518; *Young v. Dake*, 5 N. Y. 463, 55 Am. Dec. 356; *Railsback v. Walke*, 81 Ind. 409; *Huffman v. Starks*, 31 Ind. 474; *Sobey v. Brisbee*, 20 Iowa, 105; *Whiting v. Ohlert*, 52 Mich. 462, 18 N. W. 219, 50 Am. Rep. 265; *Sears v. Smith*, 3 Colo.

is certainly the more logical view. But by some of the decisions, the contract is fully performed only by the termination of the tenant's enjoyment under the lease, which, if the lease were for one year and to commence at a future day, would bring it within the scope of this clause of the statute.³³

However this may be, it seems certain that if the tenant has taken possession of the premises under the oral contract, and has made improvements or otherwise expended money thereon, so that the parties cannot be placed in statu quo, this is a part performance of the contract, which in equity is sufficient to take the case out of the statute of frauds, and to entitle the tenant to specific performance.³⁴

But though in a court of equity a contract for a lease, even if it be oral (and followed by possession and acts of part performance), may be regarded as an actual lease, conferring an equitable interest upon the lessee during the term agreed upon, it is otherwise in a court of law, and the tenant, though in possession under the oral agreement—indeed, because of that fact—is nothing more than a tenant at will.³⁵

§ 322. Same—3. Estates for Years Created by Estoppel. If one having no title to land leases it, nevertheless, to another by deed or contract, the lessee acquires, of course, no title thereto by virtue of the lease. But if the lessor subsequently acquires title to the land at any time during the term agreed upon, he is estopped to deny the title of his lessee under the lease he himself has executed.³⁶ Thus, where one, in possession of premises but without

287; *Wallace v. Scoggins*, 18 Or. 502, 21 Pac. 558, 17 Am. St. Rep. 753, note; *Steininger v. Williams*, 63 Ga. 475.

³³ *Wallace v. Scoggins*, 18 Or. 502, 21 Pac. 558, 17 Am. St. Rep. 749, 753, note; *Wheeler v. Frankenthal*, 78 Ill. 124; *Martin v. Blanchett*, 77 Ala. 288; *Oliver v. Alabama Gold Life Ins. Co.*, 82 Ala. 417, 2 South. 415; *Delano v. Montague*, 4 Cush. (Mass.) 42; *Whiting v. Pittsburg Opera House Co.*, 88 Pa. 100; *Atwood v. Norton*, 31 Ga. 507; *Jones v. Marcy*, 49 Iowa, 188.

³⁴ *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Benjamin v. Wilson*, 34 Minn. 517, 26 N. W. 725; *Morrison v. Peay*, 21 Ark. 110; *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565. Even the payment of an installment of rent seems to be a sufficient part performance to support a decree for specific performance on the part of the lessor or the lessee, as the case may be. *Grant v. Ramsey*, 7 Ohio St. 158; *Shakespeare v. Alba*, 76 Ala. 351; *Steininger v. Williams*, 63 Ga. 475; *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586.

³⁵ *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Duke v. Harper*, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; *Robinson v. Deering*, 56 Me. 357, et seq.

³⁶ 2 Min. Insts. 767; 1 Washburn, Real Prop. 484; 1 Taylor, Landl. & Ten. § 87 et seq.; *Sturgeon v. Wingfield*, 15 M. & W. 224; *Rawlyn's Case*, 4 Co. 53; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 567, 49 Am. Dec. 189. See post, § 1065 et seq. This applies to leases made by an heir ap-

title thereto, leased them with a covenant that the lessee should enjoy the premises without interference by the lessor or any one claiming under him, and the lessor subsequently acquired a title to the premises, it was held that the lessee might hold as against this newly acquired title by force of the lessor's covenant.³⁷

It was at one time thought that, to produce this effect, the lease must be by deed indented, whereby the deed becomes the act of both parties, so that the estoppel must be mutual. Hence infants, married women, or other persons disabled to execute a deed, could not take advantage of a lease enuring in this way.³⁸ But it is now recognized that a tenant is estopped to deny his landlord's title, though the tenant be under such disabilities as would invalidate his agreements, and regardless of the form of instrument under which he claims; the tenant's estoppel flowing merely from his possession under the lessor's consent, a contract or assurance on his part being immaterial.³⁹ Hence the mutuality of estoppel is secured, and the lessor is estopped on his part to deny the lessee's title as against his own lease, so long as the lessee retains possession, whether the lessee be under disabilities or not. No indenture is necessary to create such mutual estoppel.⁴⁰

Upon similar principles, if a lease for years cannot take effect immediately by reason of a prior lease of the same premises not yet expired, the second lease may operate presently by estoppel for so much of the term as may be left after the expiration of the prior lease.⁴¹

The estoppel in such cases arises from the express or implied assurance in the lease that the lessor has a good title and that the tenant shall have quiet enjoyment of the premises. It is not, however, confined in its operation to the parties to the lease, but runs with the land and is binding upon all persons claiming under the parties, as the heir of the landlord claiming by descent, or his assignee, or other privy in estate.⁴² But if the lease shows upon its

parent, a contingent remainderman, or one entitled to a contingent executory devise, etc.

³⁷ *Burr v. Stenton*, 43 N. Y. 462, 466. In this case the lessor made an express covenant for quiet enjoyment, but it is apprehended that this is immaterial; such a covenant being implied in all leases under seal. *Post*, § 368; 2 Min. Insts. 193; 1 Washburn, Real Prop. 518, 519; *Black v. Gilmore*, 9 Leigh (Va.) 448, 33 Am. Dec. 253; *Lanigan v. Kille*, 97 Pa. 120, 39 Am. Rep. 797; *Beckwith v. Howard*, 6 R. I. 1; *Hart v. Windsor*, 12 M. & W. 68, 85.

³⁸ 1 Washburn, Real Prop. 484.

³⁹ *Post*, § 357.

⁴⁰ 1 Taylor, Landl. & Ten. §§ 89, 90; 1 Washburn, Real Prop. 484.

⁴¹ 1 Taylor, Landl. & Ten. § 88; *Gilman v. Hoare*, 1 Salk. 275.

⁴² 1 Taylor, Landl. & Ten. § 91.

face, by way of recital or otherwise, that the landlord has no interest at the time of the demise, his subsequent acquisition of title to the premises does not enure to the benefit of the lessee by way of estoppel.⁴³

If the lessor has any title at all at the time of the demise, though not the title he attempts to transfer to the lessee, the latter does not acquire a title to the premises by estoppel, but only such title as the lessor may lawfully pass at the time of the lease, notwithstanding his subsequent acquisition of a better title. Thus, if a tenant *pur auter vie* makes a lease for years and then purchases the reversion in fee, the death of *cestui que vie*, even before the lapse of the term marked out in the lease, puts an end to the tenant's estate, which cannot by way of estoppel feed upon the reversion subsequently acquired by the lessor.⁴⁴ The reason is that the lease operates by way of estoppel only as a last resort, as it were, upon the maxim, *Ut res valeat magis quam pereat*, and hence, if it may operate by way of passing an interest (though a less interest than that agreed to be conveyed), it shall not operate by estoppel.⁴⁵

§ 323. **Property Wherein Estates for Years may be Enjoyed.** Estates for years may be had in any property corresponding to the description of lands and tenements. But ordinarily only such real property is the subject of lease (so as to create the relation of landlord and tenant) as, if the estate created were a freehold, might have passed by livery of seisin at common law; that is, corporeal hereditaments. With respect to incorporeal hereditaments, while corresponding contracts may be made as to them, and estates for years created, the relation of landlord and tenant does not arise.⁴⁶

While these estates are usually created in entire houses or tracts of land, it is not always so. They may be possessed in parts of a house only, and for this purpose it is immaterial whether the house be divided vertically or horizontally. The house may be leased by sections; one tenant leasing one side from basement to attic, and another the other side, with common or separate stairways. Or a tenant may lease one story, as in flats and apartment houses. The subdivision may be smaller still, and a tenant may lease a single

⁴³ 1 Taylor, Landl. & Ten. § 88; *Hermitage v. Tompkins*, 1 Ld. Raym. 729.

⁴⁴ 2 Min. Insts. 767, 768; 1 Washburn, Real Prop. 485; 1 Taylor, Landl. & Ten. § 87; *Wynn v. Harman*, 5 Grat. (Va.) 157.

⁴⁵ 2 Min. Insts. 767, 768.

⁴⁶ 1 Washburn, Real Prop. 493. But where land leased to a tenant for years has appurtenant to it a right of way over adjacent land, or other easement therein, such easement will usually pass with the land to the tenant for the period of the lease.

room. But such agreements, to constitute actual interests in land, must be made clearly with that intent. Otherwise, they will be considered as mere lodgings.⁴⁷

§ 324. **Estates for Years Distinguished from Mere Lodgings.** An estate in a house for years (which may include an interest for a month or a week) is to be carefully distinguished from a mere letting or demise of lodgings, as in a hotel or a boarding house, which does not create an interest in the property, but is a mere license arising by contract between the parties; the control of the premises remaining with the owner of the house.

In order that a contract of this sort should create an estate for years or actual interest in the building and land, it is necessary that the tenant have exclusive control and possession of the premises leased, subject to his responsibilities under the law and under the covenants, conditions and restrictions reasonably stipulated in the lease.⁴⁸ A lodger, on the other hand, merely occupies a portion of the tenement; the control and ultimate right to the possession remaining in the owner. In such cases the respective rights of the owner and the lodger depend upon the particular contract and laws controlling them, not upon the general law of landlord and tenant.⁴⁹

Hence a lodger cannot bring an action of trespass if unlawfully entered upon by the landlord or a third person, and is not liable for rent or to distress (in the absence of statute), or for damages in assumpsit for use and occupation, but can only sue and be sued upon the contract between the parties.⁵⁰ So, also, his agreement is not within the provisions of the statute of frauds relating to leases and contracts to lease real estate, since the lodger has no interest in the realty.⁵¹

⁴⁷ 1 Taylor, Landl. & Ten. § 66; *Newman v. Anderton*, 5 B. & P. 224; *Smith v. Marrable*, 11 M. & W. 5; *Wilson v. Hatton*, 2 L. R. Exch. Div. 336; *Mechelen v. Wallace*, 7 Ad. & E. 49; *Cook v. Humber*, 11 C. B. (N. S.) 44; *Wright v. Stavert*, 2 E. & E. 721, 725; *Stamper v. Sunderland*, L. R. 3 C. P. 388; *Stockwell v. Hunter*, 11 Metc. (Mass.) 448, 45 Am. Dec. 220.

⁴⁸ 1 Taylor, Landl. & Ten. § 66; *Wright v. Stockport*, 5 M. & G. 33; *Queen v. St. George Union*, L. R. 7 Q. B. 90; *Henrette v. Booth*, 15 C. L. (N. S.) 100; *Swain v. Mizner*, 8 Gray (Mass.) 182, 69 Am. Dec. 244; *Porter v. Merrill*, 124 Mass. 534.

⁴⁹ 1 Taylor, Landl. & Ten. § 66; *Kirkman v. Jervis*, 7 D. P. C. 678; *Fludice v. Lombe*, Cas. temp. Hardw. 307; *Dobson v. Jones*, 5 M. & G. 112; *Waresey v. Perkins*, 7 M. & G. 151; *Brown v. McGowan*, L. R. 5 C. P. 239; *Roads v. Trumpington*, L. R. 6 Q. B. 56, 62.

⁵⁰ 1 Taylor, Landl. & Ten. § 66; *Lee v. Gansel*, Cowp. 1; *Fludice v. Lombe*, Cas. temp. Hardw. 307; *Monks v. Dykes*, 4 M. & W. 567; *Smith v. Lancaster*, L. R. 5 C. P. 246; *Davis v. Waddington*, 7 M. & G. 85; and cases cited *supra*.

⁵¹ *Brown v. McGowan*, L. R. 5 C. P. 239; *Wright v. Stavert*, 2 E. & E.

§ 325. **The Commencement of the Lease.** The true date of a lease, like that of any other conveyance, is not necessarily the date written in the lease itself, but the date of its delivery to the lessee, at which time only it becomes operative.⁵² It is, therefore, in general unimportant when it was written, or even signed, and it is competent to show by parol when it was delivered, though no date, or an impossible one, or a different one from that of its actual delivery, be inserted in the lease.⁵³ But if the date of the commencement of the estate is entirely uncertain, and there is nothing to remove the uncertainty, as in the case of a lease from November 20, without indicating what November, the lease is void for the uncertainty.⁵⁴

It is a general rule of the common law in respect to the computation of time that where the time is to run from an act done, the day on which the act is done is to be excluded from the computation.⁵⁵ But in computing the time of the commencement of a lease, for example, where the lease is to run a year from its date, it may well be doubted whether the same rule is applicable.⁵⁶ Lord Coke and the older writers insist upon a distinction between the computation "from the day of the making" and "from the making" of the lease, holding that, where the computation is to be "from the day of the making," the day of the making of the lease is to be excluded.

721, 725; *White v. Maynard*, 111 Mass. 250, 15 Am. Rep. 28; *Wilson v. Martin*, 1 Denio (N. Y.) 602; *Polack v. Shafer*, 46 Cal. 270. In one of the English cases it is said that the criterion by which an estate for years is to be distinguished from a mere contract for lodgings is "the possession of the street door. If exclusive control is retained by the landlord, so that the tenants could only come in and go out with his assent and permission, then it may be said that they are mere inmates and lodgers, and not lessees." *Queen v. St. George Union*, L. R. 7 Q. B. 90, 97, 98.

⁵² 2 Min. Insts. 731 et seq.; post, § 916.

⁵³ 2 Min. Insts. 753; 1 Washburn, Real Prop. 469; Bac. Abr. Lease (2); *Hall v. Cazenove*, 4 East, 477, 481; *Steele v. Mart*, 4 B. & Cr. 272; *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230; *Batchelder v. Dean*, 16 N. H. 265, 268. Thus, where a lease purported to bear date March, 1783, and to run "from March last past" for thirty-five years, it was held competent to show by parol that the lease was not delivered until after March, 1783, and that it began, therefore, in March, 1783, not in March, 1782. *Steele v. Mart*, supra.

⁵⁴ 2 Min. Insts. 753; Bac. Abr. Lease (2).

⁵⁵ 2 Min. Insts. 190; 2 Bl. Com. 140, note (3); *Baylor, Bills*, 155; *Lester v. Garland*, 15 Ves. 253. Thus, if a negotiable security is payable so many days after sight, the day of presentment or of sight is not to be reckoned; and so, where a security is to be given within six months after the testator's death, the day of the death is to be excluded. 2 Min. Insts. 190.

⁵⁶ 2 Min. Insts. 754. A large number of cases upon this point will be found collected in a note to 49 L. R. A. 210.

ed, while, if it is to be "from the making," the day is to be included.⁵⁷

But the more modern and the better doctrine appears to be that the word "from" may in the strictest propriety of language be taken as either inclusive or exclusive of the day, according as the circumstances of the case may require.⁵⁸ Thus, in a lease made under a power to grant leases in possession, but not in futuro, the word "from" ought to be construed as intended to include the day of the making, for otherwise the lease would be inoperative.⁵⁹ Indeed, it is perhaps not too much to say that in general the words "from the date," when used to pass an interest, are to be construed as inclusive of the day,⁶⁰ upon the well-settled rule of construction that conveyances are to be construed most strongly against the grantor and in favor of the grantee.⁶¹

§ 326. **Estates for Years may Commence or Shift to Another in Futuro.** The common law rigorously enforced the rule prohibiting the abeyance of the freehold, and such an estate was never permitted at common law to spring up in futuro, unless there is a preceding estate; the freehold taking effect in the latter event as a remainder.⁶² Nor did the common law permit a freehold once vested to be divested upon the happening of a future contingency, so as to go over to a third person. Hence, if a conveyance be made "to A. and his heirs, but if A. die under twenty to C. and his heirs," the estate in C. is at common law of no effect, even though A. die under twenty.⁶³

The livery of seisin required at common law to create a freehold estate is at the foundation of both of these principles. For, since livery of seisin is nothing more than the delivery of the possession of the freehold by the grantor to the grantee, it must operate immediately or not at all; it cannot take effect in futuro; and hence it is that an estate of freehold cannot at common law be made to commence in futuro, without a tenant of a preceding estate to whom the livery may be given.⁶⁴

⁵⁷ 2 Min. Insts. 754; 2 Th. Co. Lit. 407, 408; *Cornish v. Cawsey*, Aleyn, 77.

⁵⁸ 2 Min. Insts. 754.

⁵⁹ *Freeman v. West*, 2 Wils. 265; *Pugh v. Duke of Leeds*, Cowp. 714; *Hatter v. Ash*, 1 Ld. Raym. 48.

⁶⁰ 2 Min. Insts. 754; *Bellasis v. Hester*, 1 Ld. Raym. 280; *King v. Adderley*, 2 Dougl. 465.

⁶¹ 2 Min. Insts. 754, 1058; 4 Kent, Com. 95, note (B); *Lester v. Garland*, 15 Ves. 248; *Lysle v. Williams*, 15 Serg. & R. (Pa.) 135.

⁶² Ante, § 136; post, § 676 et seq.

⁶³ Post, § 680.

⁶⁴ Ante, § 136; 2 Bl. Com. 144, 165, 166, 314; 3 Th. Co. Lit. 102, note (G).

And since livery of seisin was the reliance of the common law to give notoriety to a transfer of a freehold, that law also demanded that the freehold thus notoriously created, if it is terminated otherwise than by the regular expiration of its original limitation, as upon a breach of condition, be terminated by an act of equal notoriety with the livery creating it. This act of corresponding notoriety was found in the re-entry of the grantor or his heirs for the condition broken; and it was a principle of the common law that upon a grantor's re-entry for condition broken he was seised of the land as before the grant, under paramount title (that is, he is seised as if there had never been a grant), thus wiping out all subsequent limitations dependent upon the happening of the contingency.⁶⁵

Remembering that these results flowed from the common-law requirement of livery of seisin, it will be readily seen that since actual livery of seisin was dispensed with, as it has been under the statutes of uses,⁶⁶ and of wills,⁶⁷ the consequences above mentioned have ceased to follow, so that now for several centuries past estates of freehold have been freely created to commence in futuro without any preceding estate, and have been permitted, when once vested, to shift over to another person upon the happening of a contingency. Such estates are known generally as executory limitations, or specifically as executory uses or executory devises, and in another aspect as springing or shifting limitations, according as they spring up in futuro without a preceding estate or shift from one to another upon the happening of a contingency.⁶⁸

It has been necessary thus to anticipate briefly the very important principles regulating executory limitations of freehold estates in order that the creation of future estates for years may be properly understood.

With respect to the latter, it is to be observed that, no livery of seisin being required at common law to commence such estates, but only an *ex parte* entry (which might be made in the absence of the lessor or after his death, or even after the lessee's death by his personal representative⁶⁹), there was never any difficulty in creating a term for years, to commence in futuro.⁷⁰ And for the same reason such an estate might, even at common law, be made to cease before its regular expiration, and to shift over to another upon the

⁶⁵ Post, §§ 480, 680.

⁶⁶ 27 Hen. VIII, c. 10.

⁶⁷ 32 Hen. VIII, c. 1; 34 Hen. VIII, c. 5; 29 Car. II, c. 3, § 5.

⁶⁸ Post, § 675 et seq.

⁶⁹ Ante, § 318.

⁷⁰ 2 Min. Insts. 191, 192, 2 Bl. Com. 143, 144, 165.

happening of a future contingency, without the necessity for any re-entry of the grantor to terminate the first taker's estate.⁷¹

§ 327. **Same—Lease to Commence in Futuro Distinguished from Executory Contract to Lease.** It is often important and sometimes difficult to determine whether a particular written instrument is intended as a present executed lease, with the possession to be given in futuro (that is, a lease to commence in futuro), or as a present executory contract to execute in futuro a lease. And, indeed, the same question presents itself where the possession is given immediately whether the writing is intended as a present lease or a contract to execute a lease in the future.

These are questions of the intention of the parties, to be gathered from the entire instrument and from the surrounding circumstances, rather than from particular words or expressions in any single part of the instrument. If the intention is shown to part with the possession immediately, the agreement will usually be construed to be a present lease; and so if the intent be shown to give the possession to the lessee at any time before the execution of the stipulated future lease. In such cases, the agreement for a further lease is regarded simply as an indication that the first lease has been hurriedly drawn and is a preliminary draft, and that the second is designed to be merely a fuller and more perfect assurance of title.⁷² Thus, where it was stipulated that "A. agrees to let and B. agrees to take" certain premises for a designated term of years, and upon compliance with certain terms A. was to execute a lease, but meanwhile that "this agreement shall be considered binding till one fully prepared can be produced," the instrument was held to be a lease in præsentî; the possession being given and the court considering that the stipulation for a future and more formal lease might be for the more convenient underletting or assignment of the premises.⁷³

But, if a fuller lease is to be executed before the possession is given, the first instrument is to be regarded merely as an executory contract for a lease to be made in the future, and as such

⁷¹ 2 Min. Insts. 192; 2 Th. Co. Lit. 87, 88. Hence a demise "to J. S. for one hundred years, but if he do not pay \$1,000 on January 1, his estate to go over to B. C.," immediately by the original common law vests an estate for the balance of the hundred years in B. C. if J. S. do not pay the money promptly. 2 Min. Insts. 192.

⁷² 2 Min. Insts. 751; 1 Washburn, Real Prop. 480, 481; *Morgan v. Bissell*, 3 Taunt. 65; *Goodtitle v. Way*, 1 T. R. 735; *Doe v. Clare*, 2 T. R. 739; *Tempest v. Rawlings*, 13 East, 18; *Doe v. Groves*, 15 East, 244; *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. 457; *Jackson v. Kisselbrack*, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341.

⁷³ *Poole v. Bentley*, 12 East, 168; *Doe v. Groves*, 15 East, 244.

need not be under seal at all, but must be in writing if the contract be for a lease for more than one year, or if the lease is not to be executed within one year.⁷⁴

If, as a matter of fact, the lessee does not assume possession under the contract, and the intention whether to give possession before or after the execution of the future lease cannot be clearly gathered from the instrument itself, the acts and declarations of the parties, it seems, may be looked to in aid of the construction to be placed upon the agreement.⁷⁵ Should these aids fail also, the further test is laid down that, if the agreement of the parties leaves nothing incomplete or unprovided for that is essential to a good lease, the agreement is to be regarded as a present demise.⁷⁶

On the other hand, though the agreement is in perfect form, the most proper words of leasing being made use of, yet if, upon the whole instrument, there appears the intent that it shall be taken only as a preliminary draft of the real lease, the law will rather do violence to some of the words used than to the manifest intent of the parties by construing that to be a present lease which is plainly intended only as an agreement for one.⁷⁷

§ 328. Incidents of Estates for Years—Discussion Outlined. The general rights and obligations of the landlord and the tenant of land, respectively, depend in part upon the law and in part upon the covenants and stipulations contained in the lease, which will be more fully discussed hereafter in examining the relation of landlord and tenant.⁷⁸ Attention will now be confined to those incidents which are annexed by law to estates for years.

We shall consider: (1) The tenant's power of alienation; (2) his right of estovers; (3) his right to emblements; (4) his liability for waste; (5) the doctrine of merger; (6) the tenant's right to the exclusive possession of the premises.

§ 329. Same—1. Tenant's Power to Aliene Estate for Years. At common law a tenant for years, like a tenant for life, was re-

⁷⁴ Ante, § 321; 1 Washburn, Real Prop. 481; McGrath v. Boston, 103 Mass. 369; People v. Gillis, 24 Wend. (N. Y.) 201; Buell v. Cook, 4 Conn. 238; Aiken v. Smith, 21 Vt. 172; Griffin v. Knisely, 75 Ill. 411. In Buell v. Cook, supra, the lessor was to obtain an authority from another person before he could make a valid lease. It was held, therefore, that the contract was executory. So, in McGrath v. Boston, supra, the agreement was held executory, because it was stipulated that a lease was to be given after repairs were made.

⁷⁵ Doe v. Ashburner, 5 T. R. 163; Chapman v. Bluck, 4 Bing. N. C. 187.

⁷⁶ 1 Washburn, Real Prop. 482; Kabley v. Worcester Gas Co., 102 Mass. 392; Shaw v. Farnsworth, 108 Mass. 357; Haven v. Wakefield, 39 Ill. 509.

⁷⁷ 2 Min. Insts. 751; Goodtitle v. Way, 1 T. R. 735; Doe v. Clare, 2 T. R. 739; Tempest v. Rawlings, 13 East, 18; Doe v. Smith, 5 East, 530; Tunis v. Grandy, 22 Grat. (Va.) 125, 126.

⁷⁸ Post, § 350 et seq.

stricted in his power of aliening his estate by the single limitation that he must not by a tortious conveyance aliene a greater estate than he has, the penalty being a forfeiture of his estate to the reversioner or remainderman.⁷⁹

But the tenant may be restricted in his power to aliene by covenants, or by conditions in the lease terminating the estate upon any attempt by him to assign or sublease the premises, which conditions, even though in absolute restraint of his power to assign or sublease, are not void, as they would be if attached to a fee simple,⁸⁰ but are valid and binding.⁸¹

In the absence, however, of any such restrictions imposed by the parties' own stipulations, the law imposes none, and permits the tenant to aliene his estate (1) by sublease; and (2) by assignment.

A sublease exists where the tenant alienes the land for only a part of his time, leaving a reversion in himself, while by an assignment he transfers his whole interest to another—either in the entire land or in part thereof—leaving no reversion in himself as to the part disposed of.⁸²

The essential difference between the two modes of alienation is that the undertenant, in the case of a sublease, is neither in privity of contract nor in privity of estate with the original lessor, while the assignee of the lessee for years is in privity of estate with the original lessor, and succeeds to the rights and liabilities accruing to the lessee upon his covenants—at least upon such of the covenants as run with the land.⁸³

§ 330. Same—2. Tenant's Right of Estovers. In respect of estovers, the tenant for years, unless it be otherwise stipulated, has the same right as a tenant for life to cut down or take and use for the necessities of the land leased such timber and other natural supplies as he may need for fuel, repairs, etc.⁸⁴

An analogous right to which the tenant is entitled is that of cutting down underbrush at any time, so that he does not destroy the young timber and subsequent growth.⁸⁵

§ 331. Same—3. Tenant's Right to Emblements. Emblements, it will be remembered, accrue only to tenants whose estates (1) come to an unexpected end, (2) without their own default, and (3) where the tenant himself has planted the crops.⁸⁶

⁷⁹ Ante, § 194 et seq.

⁸¹ Post, § 525.

⁸⁰ Ante, § 151; post, § 516 et seq.

⁸² Post, § 374 et seq.

⁸³ These principles are discussed quite fully hereafter. See post, § 374 et seq.

⁸⁴ Ante, §§ 39, 193.

⁸⁵ 2 Min. Insts. 603, 604.

⁸⁶ Ante, § 42 et seq.

It is obvious that the first of these requirements would in most cases stand in the way of any claim to emblements as incident to the termination of an estate for years, since in its very nature the end of such an estate is definite and fixed, and not unexpected—except that in some states by local custom the doctrine of “away-going crops” permits a lessee for years to take the crops growing upon the land at the termination of the lease.⁸⁷

But, even independently of the doctrine of “away-going crops,” cases may arise in which a tenancy for years may come to an unexpected end, and if it does the tenant is at common law entitled to emblements. Thus, if a tenant for life leases to another for years, and the latter plants a crop, and before harvest the life tenant dies, whereby the lessee’s estate is immediately terminated without his default, the lessee is at common law entitled to the emblements, and to free ingress and egress to cultivate and harvest the same.⁸⁸

§ 332. Same—4. Tenant’s Liability for Waste. The subject of waste will be discussed quite fully hereafter,⁸⁹ so that it may here be dismissed in a few words.

Waste is any permanent injury to the inheritance, arising otherwise than by an act of God or a public enemy,⁹⁰ and the tenant for years is under the same obligations with respect thereto as a tenant for life.⁹¹

The lessee has the right to use the premises, in the absence of a contrary stipulation, in any way he pleases, so that he be not guilty of waste, unless he has leased them for a particular purpose, in which case he is confined to that use or to uses very similar. One who leases a building for hotel purposes, for instance, cannot convert it into a public seminary.⁹²

As a result of his liability for waste, also, the tenant is to a certain extent bound to make repairs, not, by any means, that he is bound to replace structures dilapidated or destroyed by time or use, or to substitute new structures for old, in the absence of a stipulation to that effect;⁹³ but under his liability for waste, if

⁸⁷ Ante, § 45.

⁸⁸ Ante, § 44; 2 Min. Insts. 104, 196; 2 Bl. Com. 124, 145; 1 Washburn, Real Prop. 141.

⁸⁹ Post, § 379 et seq.

⁹⁰ Post, § 379.

⁹¹ Ante, § 199. For the tenant’s right to remove fixtures, see ante, §§ 35, 36.

⁹² 2 Min. Insts. 761; 1 Washburn, Real Prop. 358, 359; 1 Taylor, Landl. and Ten. § 343.

⁹³ Post, § 379; *United States v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65; *Smith v. Kerr*, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; *Johnson v. Dixon*, 1 Daly (N. Y.) 178; *Earle v. Arbogast*, 180 Pa. 409, 36 Atl. 923; *Long v. Fitzsim-*

a house be unroofed by a tempest, or a door or window blown in, while not liable for the initial damage, which is caused by the act of God, and is therefore not waste, the tenant would be responsible for any damage subsequently ensuing to the building by the inroads of the weather. It is his duty to put up a temporary roof, door or window, or otherwise keep out the weather, or he is liable for permissive waste.⁹⁴

§ 333. Same—5. Doctrine of Merger. It is a general rule of the common law, already observed,⁹⁵ that two estates in the same land, the one larger and the other smaller, will not be supposed to be vested in the same party in his own right at the same time. The lesser is merged, swallowed up and extinguished by the greater. This is always true, in a court of law at least, if the greater estate be a freehold and the lesser a term for years, provided there be no estate intervening between the two, and provided, further, that the two estates are not originally limited to the same person.⁹⁶

Merger depends upon the intention, actual or presumed; and hence no merger occurs in any case where it is the manifest intention that it should not take place. Upon a conveyance "to A. for ten years, remainder to B. for twenty years," if A. surrender his interest to B., the purpose may be either (1) to increase B.'s estate by the addition of the ten years belonging to A., or (2) without increasing B.'s estate to permit him to enjoy his own twenty-year estate ten years earlier than he otherwise would. If the last is the real intent, and such is *prima facie* presumed to be the case, there is a merger of A.'s term into B.'s; if the first, there is no merger, and B. takes the estate for the entire period of thirty years.⁹⁷ The presumption of merger, however, seems to be stronger in case of a reversion than in case of a remainder.⁹⁸

mons, 1 Watts & S. (Pa.) 530; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446.

⁹⁴ Post, §§ 379, 386; Co. Lit. 53a; 2 Min. Insts. 614; *Hitner v. Ege*, 23 Pa. 305; *Suydam v. Jackson*, 54 N. Y. 450; *Townshend v. Moore*, 33 N. J. Law, 284.

⁹⁵ Ante, § 201. The only exception is the case of an estate tail. Ante, § 191.

⁹⁶ 2 Min. Insts. 197, 430. The first of these provisos depends upon the principle that merger is never permitted if the rights of third persons are thereby impaired; and the second, upon the principle that merger is a matter of the intention of the parties, and no presumption of such an intent will arise if the grantor himself has conveyed both estates to the same person by the same conveyance.

⁹⁷ 2 Min. Insts. 430; 2 Th. Co. Lit. 557, note (K); 1 Washburn, Real Prop. 586, 587; 3 Preston, Conv. 201; *Bredon's Case*, 1 Co. 77a; *Treport's Case*, 6 Co. 15a.

⁹⁸ 1 Washburn, Real Prop. 586.

It is to be observed that while, as between a freehold and a term for years, the former is always regarded as the greater estate, as between two estates for years the reversionary estate by way of remainder or reversion is regarded as the greater, in which the other merges, though in point of fact it may be limited to endure for a shorter period.⁹⁹

It is also to be noted that even if the circumstances are such as, in a court of law, would call for a merger, a court of equity will relieve against it, if to enforce it would result in injury to innocent third parties.¹ Thus, in a Virginia case, A. leased to B. for twenty years, with liberty to B. to surrender the lease at any time before the expiration of the term upon payment of five shillings. A. devised the rents during the term to his five daughters, and the fee to his son, P., who sold to B., who then surrendered his lease. It was held that this should not operate as a merger, and thereby disappoint the daughter's legacies.²

§ 334. Same—6. Tenant's Right to Exclusive Possession of the Premises. The theory of the law, upon a lease for years, as well as for life, is that during the period of the lease the land belongs exclusively to the lessee, unless rights of entry, etc., are reserved to the lessor by the lease itself. In the absence of any such reservation or exception, the lessor is so effectually divested of the possession during the term that he cannot maintain an action of trespass against a stranger who enters and cuts trees upon the premises, or commits other acts of trespass, even though the tenant himself be restrained by his covenants from doing such acts.³ In a case of this kind, the tenant may sue the stranger in trespass for the unlawful entry; but the landlord should sue in trover for the value of the trees.⁴

The lessee is entitled to the exclusive possession during the term as against the lessor as well as third parties, in the absence of stipulations to the contrary, and the lessor becomes a trespasser if he enters upon the premises without the lessee's consent, express or implied.⁵

⁹⁹ 2 Min. Insts. 197.

¹ 2 Min. Insts. 198; *Powell v. Morgan*, 2 Vern. 90; *Graham v. Woodson*, 2 Call (Va.) 249.

² *Graham v. Woodson*, 2 Call (Va.) 249.

³ 1 Washburn, Real Prop. 497; *Greber v. Kleekner*, 2 Pa. 289. But, had the landlord excepted the trees from the lease, he might maintain trespass. 1 Washburn, Real Prop. 497, 498.

⁴ *Burnett v. Thompson*, 51 N. C. 210, 213. The same principles would govern the taking from the premises by a stranger of the crops, minerals, etc. 1 Washburn, Real Prop. 498.

⁵ 1 Washburn, Real Prop. 498.

CHAPTER XV.

ESTATES AT WILL.

- § 335. Nature and Creation of Estate at Will.
- 336. Nature of Estates Determinable at the Will of One Party Only.
- 337. Tenant at Will Cannot Assign His Interest.
- 338. Incidents of Estates at Will.
 - 1. Estovers.
- 339. 2. Emblements.
- 340. 3. Liability of Tenant at Will for Waste.
- 341. 4. Liability of Tenant at Will for Rent.
- 342. Termination of Estates at Will.

§ 335. **Nature and Creation of Estate at Will.** An estate at will arises where lands or tenements are expressly demised by one person to another to be held during the joint wills of both parties; or it may arise by implication of law wherever one person is put in possession of another's land with the owner's consent, but under an agreement which does not suffice to create in the tenant an estate of freehold or for years.¹

Thus, at common law, if one enters upon land under a feoffment purporting to pass a freehold, but without livery, the freehold does not pass, but the tenant is in possession by the agreement and consent of the owner, and a tenancy at will is created.²

So, if one enter upon land under a verbal lease from the owner for a term required by the statute of frauds to be created by a written instrument, or a verbal conveyance for life or in fee, the tenant cannot take the estate agreed upon in the lease or conveyance; yet he is in possession by the consent of the owner, without any definite estate in the land, and hence a tenancy at will arises by implication.³ So, also, it is in the case of a vendee of land under a contract of sale who is put in possession, while in equity he is regarded as the true owner, if entitled to specific performance, he is in a court of law regarded only as a tenant at will.⁴ And so in

¹ 2 Min. Insts. 198; 1 Washburn, Real Prop. 612, 613, 623; 2 Bl. Com. 145; 1 Th. Co. Lit. 637, note (A).

² 2 Min. Insts. 745; 2 Bl. Com. 311.

³ 2 Min. Insts. 198; *Leavitt v. Leavitt*, 47 N. H. 329; *Gould v. Thompson*, 4 Metc. (Mass.) 224; *Hall v. Wallace*, 88 Cal. 434, 26 Pac. 360; *Patterson v. Stoddard*, 47 Me. 355, 74 Am. Dec. 490; *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318; *Doe v. Chamberlaine*, 5 M. & W. 14; *Right v. Beard*, 13 East, 210. See *Lyon v. Cunningham*, 136 Mass. 532. But see 1 Taylor, Landl. & Ten. § 25, note, and cases there cited.

⁴ 1 Washburn, Real Prop. 622; *Twyman v. Hawley*, 24 Grat. (Va.) 514, 18 Am. Rep. 661; *Creigh v. Henson*, 10 Grat. (Va.) 232; *Jackson v. Miller*, 7

the case of a mortgagor (under the common-law theory) or grantor in a deed of trust, who remains in possession of the premises mortgaged without any express stipulation that he may remain there until default.⁵

Since the tenant in possession under such circumstances has a lawful interest in the land, and is no trespasser nor wrongdoer, he cannot be evicted nor sued in ejectment until he has received notice that the tenancy is terminated and that he must surrender the premises.⁶

It must be observed, however, that if the estate at will arises by implication it remains an estate at will only until the payment and acceptance of rent. Immediately thereupon it becomes an estate from year to year, which is quite a different estate.⁷ At present the only estate which, despite the payment and acceptance of rent, may remain an estate at will, is that created expressly to terminate at the will of either party.

§ 336. Nature of Estates Determinable at the Will of One Party Only. A tenancy at will is at the will of both parties, and either the lessor or the lessee may always terminate it at pleasure.⁸ But this does not necessarily mean that an estate cannot be created which may be expressed to be terminable at the will of only one of the parties, but that, if created, it must be regarded either as an estate at will, and therefore terminable, upon the principle of mutuality, at the will of either party,⁹ or else as an estate for the period named in the lease, liable to be suddenly determined by the exercise of the option of one of the parties.¹⁰

Cow. (N. Y.) 747; Weed v. Lindsay, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33; Freeman v. Headley, 33 N. J. Law, 523; Jones v. Jones, 2 Rich. Law (S. C.) 542; and cases cited supra.

⁵ 2 Min. Insts. 198; Creigh v. Henson, 10 Grat. (Va.) 232.

⁶ 2 Min. Insts. 199; Right v. Beard, 13 East, 210; Newley v. Jackson, 1 B. & Cr. 448; Twyman v. Hawley, 24 Grat. (Va.) 514, 18 Am. Rep. 661.

⁷ 2 Min. Insts. 200; post, § 347.

⁸ 2 Min. Insts. 199; 1 Th. Co. Lit. 637; 2 Bl. Com. 145; Cowan v. Radford Iron Co., 83 Va. 551, 3 S. E. 120; Oglesby v. Hughes, 96 Va. 115, 30 S. E. 439; Cheever v. Pearson, 16 Pick. (Mass.) 266; Knight v. Indiana Coal & Iron Co., 47 Ind. 105, 17 Am. Rep. 692; Doe v. Richards, 4 Ind. 374; Withers v. Larabee, 48 Me. 570. But see Effinger v. Lewis, 32 Pa. 367.

⁹ 2 Min. Insts. 199; Cowan v. Radford Iron Co., 83 Va. 551, 3 S. E. 120. See, also, Cheever v. Pearson, 16 Pick. (Mass.) 266; Knight v. Indiana Coal & Iron Co., 47 Ind. 105, 17 Am. Rep. 692; Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923. But see Gilmore v. Hamilton, 83 Ind. 196.

¹⁰ 1 Washburn, Real Prop. 613; Doe v. Browne, 8 East, 165; Beeson v. Burton, 12 C. B. 647; Davis v. Waddington, 7 M. & G. 37, 47. note; Myers v. Kingston Coal Co., 126 Pa. 582, 17 Atl. 891; Effinger v. Lewis, 32 Pa. 367; Shaw v. Hoffman, 25 Mich. 162.

It seems to be pretty clear that if the estate is expressly declared terminable at the will of one of the parties, and nothing is said as to its binding effect on the other, it is an estate at the will of both parties, and either may terminate it at his option.¹¹ But if either party is bound by the terms of the lease for a particular period, with an option in the other to terminate it when he pleases, it would seem that, while this vests an interest in the lessee, it is not properly an estate at will, but a conditional estate for the term agreed upon, liable to be determined suddenly by the exercise of the option.¹² Thus, where the tenancy was stipulated to be for five years, unless the lessor should desire to build upon the leased premises, in which case the lessee was to quit, it was held not to be a tenancy at will, but one upon condition, and terminable only upon reasonable notice to the lessee of the lessor's intention to build.¹³

§ 337. **Tenant at Will Cannot Assign His Interest.** A tenancy at will is regarded by the law as a very precarious interest, being terminable at any moment at the mere caprice of either party, and hence, though of indeterminate duration, is not an estate of freehold.¹⁴

For the same reason, the tenant at will cannot execute a binding assignment of the premises to a third person; the attempt to do so operating a termination of the estate, if the lessor so desires.¹⁵ But, if he merely subleases, it seems that the underlease is valid, as between him and his sublessee, so long as the tenant at will is permitted to occupy the premises.¹⁶

In any event, the lessee or assignee of the tenant at will, from the original lessor's point of view, is not to be regarded as himself a tenant at will, but merely as a tenant by sufferance, unless the lessor accepts rent from him and thereby makes him a tenant from year to year.¹⁷

§ 338. **Incidents of Estates at Will—1. Estovers.** In the absence of stipulations to the contrary, a tenant at will may cut and

¹¹ *Cowan v. Radford Iron Co.*, 83 Va. 551, 3 S. E. 120; *Harrison v. Middleton*, 11 Grat. (Va.) 527; *Doe v. Richards*, 4 Ind. 374.

¹² 1 Washburn, Real Prop. 613; *Shaw v. Hoffman*, 25 Mich. 162; and other cases cited supra.

¹³ *Shaw v. Hoffman*, 25 Mich. 162.

¹⁴ Ante, § 129.

¹⁵ *Pinhorn v. Souster*, 8 Exch. 763, 772; *Clark v. Wheelock*, 99 Mass. 14; *Cooper v. Adams*, 6 Cush. (Mass.) 87; *Reckhow v. Schanck*, 43 N. Y. 448; *Say v. Stoddard*, 27 Ohio St. 478; *Cunningham v. Holton*, 55 Me. 33, 38; *Dingley v. Buffum*, 57 Me. 381; *Austin v. Thomson*, 45 N. H. 117.

¹⁶ 1 Washburn, Real Prop. 614. See *Holbrook v. Young*, 108 Mass. 83, 85.

¹⁷ 1 Washburn, Real Prop. 614.

use such timber, etc., on the premises as may be necessary for fuel or repairs upon the premises so leased, like any other tenant.¹⁸

§ 339. **Same—2. Emblements.** Since the estate of a tenant at will is of uncertain duration, if he plants crops and the estate is terminated before harvest not by his act, he is, like other tenants of uncertain interests, entitled to the emblements, and to free ingress and egress to cultivate, harvest and carry them away. But it is otherwise if the estate be terminated by the exercise of his will, or by his default.¹⁹

§ 340. **Same—3. Liability of Tenant at Will for Waste.** It seems that a tenant at will, committing voluntary waste, is considered thereby to have terminated his estate, and he becomes straightway liable to the lessor as for a trespass, like a stranger, and not as for waste, like a tenant.

But for permissive waste he is, in England, not liable at all, not falling within the terms of the statute of Marlebridge, 52 Hen. III, c. 23, which declares all tenants for life or for years liable for waste, but omitting tenants at will.²⁰

§ 341. **Same—4. Liability of Tenant at Will for Rent.** If the estate be an expressly created estate at will, the tenant at will is liable for rent in accordance with the stipulations and intent of the parties, like other tenants, and a failure to pay the same may be remedied as in other cases. And if, by the will or act of the lessee, the estate be terminated before a rent day, the tenant is bound to pay the rent up to the next rent day, for otherwise an injustice would be done the lessor.²¹

On the other hand, if the estate be determined before rent day by the will or act of the lessor, upon the maxim, "*Annua nec debitum judex non separat*," the tenant would at common law escape all liability for rent accruing since the last rent day.²²

In cases where the estate at will has arisen by implication of law, there being no express agreement to pay rent, as where a vendee of land under a contract of sale is put in possession of the premises, his liability to pay rent for his use and occupation depends upon circumstances.

¹⁸ 2 Min. Insts. 199; ante, § 39.

¹⁹ 2 Min. Insts. 199; 1 Th. Co. Lit. 638 et seq.; ante, § 42 et seq.

²⁰ 2 Min. Insts. 199; 1 Th. Co. Lit. 644, 645.

²¹ 2 Min. Insts. 200; 2 Bl. Com. 147. But this is an insufficient expedient to prevent injustice, since the lessee might, in view of it, terminate the estate on, or just before, a rent day, and thus leave the premises without a tenant. 2 Min. Insts. 200.

²² 2 Min. Insts. 52. See ante, § 207. In the United States, generally, rent is apportionable by statute.

Thus, if the ultimate failure of the contract is the fault of the vendor, the vendee is not bound to pay rent for his previous occupation, in the absence of an express stipulation to that effect.²³ But if, after the contract of purchase is entirely at an end, and known to be so, the proposed purchaser continues to hold possession, there arises an implied undertaking on his part to pay for such use and occupation.²⁴

On the other hand, if the failure of the contract is due to the fault of the vendee, as by his refusal to perform the contract or to accept a conveyance, he is liable to the vendor in damages for his use and occupation. Some of the courts have held in such case that he may be made liable in *assumpsit* for use and occupation, implying a contract to pay rent upon equitable grounds; but the better opinion is that a contract is not to be implied from circumstances, the occurrence of which never entered into the minds of either party, and hence that the owner's remedy in such case is not in *assumpsit*, but in trespass or trespass on the case.²⁵

§ 342. **Termination of Estates at Will.** A tenancy at will is terminable at any time, at the will of either party. The exercise of this option may be either (1) express, as by declaring that the lessee shall or will hold no longer (the declaration to be made on the premises, or made known to the other party);²⁶ or (2) implied, as by the exercise of any act of ownership on the part of the lessor, inconsistent with the continued existence of the lessee's estate, such as the lessor's entry on the premises and cutting timber or harvesting crops growing thereon, or his feoffment or lease of the premises to another, to commence immediately; or, on the part of the lessee, by any act of abandonment or desertion of the premises, for example, the assignment of the premises to another, or by any act of destruction, such as the commission of voluntary waste; or, as to either, by death. But the marriage of a feme, whether she be the lessor or the lessee, does not of itself terminate a tenancy at will.²⁷

²³ *Winterbottom v. Ingham*, 7 Q. B. 611; *Tew v. Jones*, 13 M. & W. 14; *Howard v. Shaw*, 8 M. & W. 118; *Little v. Pearson*, 7 Pick. (Mass.) 301, 19 Am. Dec. 289; *Sylvester v. Ralston*, 31 Barb. (N. Y.) 286; *Bell v. Ellis*, 1 Stew. & P. (Ala.) 294; *Coffman v. Huck*, 24 Mo. 496; *Harle v. McCoy*, 7 J. J. Marsh (Ky.) 318, 23 Am. Dec. 407.

²⁴ *Howard v. Shaw*, 8 M. & W. 118; *Hogsett v. Ellis*, 17 Mich. 351.

²⁵ 1 Washburn, Real Prop. 626; *Kirtland v. Passett*, 2 Taunt. 145; *Howard v. Shaw*, 8 M. & W. 123; *Bancroft v. Wardwell*, 13 Johns. (N. Y.) 489, 7 Am. Dec. 396; *Brewer v. Conover*, 18 N. J. Law, 214; *Bell v. Ellis*, 1 Stew. & P. (Ala.) 294; *Clough v. Hasford*, 6 N. H. 231.

²⁶ 2 Min. Insts. 199; 2 Bl. Com. 146; 1 Th. Co. Lit. 646, 647.

²⁷ 2 Min. Insts. 199, 200; 2 Bl. Com. 146; 1 Th. Co. Lit. 648; *Clark v.*

But, while the estate is thus terminated at once, the law is not so unjust as to deny the tenant the right to enter thereafter upon the premises within a reasonable time for the purpose of removing his effects (including emblements, when he is entitled to them).²⁸

It is to be observed that no formal notice, such as is demanded in the case of a tenancy from year to year, is necessary to terminate an estate at will. The omission of notice may often result in injustice to one or the other of the parties—an injustice which the common law attempted to obviate by entitling the tenant, on the one hand, to emblements and to a reasonable time to remove his effects without being regarded as a trespasser; and, on the other, by entitling the lessor to rent up to the next rent day if the tenancy were terminated by the act of the lessee.²⁹

These protections against injustice were, however, so inadequate on either side to prevent the parties severally from doing a prejudice to one another, that the courts have for more than a century past inclined to lean as much as possible against construing leases to create estates at will by implication, but rather tenancies from year to year (especially where rent is reserved) for the termination of which a notice to quit is necessary. But, of course, if the estate is expressly stipulated to be an estate at will, it must be so regarded.³⁰

Wheelock, 99 Mass. 14; *McFarland v. Chase*, 7 Gray (Mass.) 462; *Curtis v. Galvin*, 1 Allen (Mass.) 215; *Robinson v. Deering*, 56 Me. 357; *Davis v. Brookbank*, 9 N. H. 73.

²⁸ 2 Min. Insts. 200; 1 Washburn, Real Prop. 620; *Doe v. McKaeg*, 10 B. & Cr. 721; *Turner v. Doe*, 9 M. & W. 647; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Rising v. Stannard*, 17 Mass. 282.

²⁹ Ante, § 341; 2 Min. Insts. 200; 2 Bl. Com. 146, 147.

³⁰ 2 Min. Insts. 200; 2 Bl. Com. 147; post, § 347.

CHAPTER XVI.

ESTATES BY SUFFERANCE.

- § 343. Nature of Tenancy by Sufferance.
- 344. Termination of Tenancy by Sufferance.
- 345. Landlord's Liability for Forcible Expulsion of Tenant by Sufferance.
- 346. Liability of Tenant by Sufferance for Rent.

§ 343. **Nature of Tenancy by Sufferance.** The so-called "estate" by sufferance arises where one comes into possession of land for a time by a lawful title, but keeps it afterwards without any title at all.¹

The simplest illustration of this is where one takes a lease for a year or other period, and after that period has expired continues to hold the premises without any new lease from the lessor, though a fresh lease is implied if the lessor receive rent from him; the tenant by sufferance in such case becoming a tenant from year to year.² But the tenancy may arise in other cases, as in case of a tenant per auter vie holding over after the death of cestui que vie,³ or a tenant at will whose estate has been terminated by the lessor's act,⁴ or undertenants who hold after the expiration of the original lease,⁵ or a grantor of land agreeing to deliver possession by a certain day and holding over.⁶

But the term "estate by sufferance" is somewhat of a misnomer, for the tenant by sufferance has no real interest in the land. He is merely not a trespasser, out of regard to the lawful estate of which he has lately been possessed,⁷ nor is he in possession by the permission or consent of his former lessor. On the contrary, his possession is tortious and wrongful, though it does not originate in tort.⁸

¹ 2 Min. Insts. 202; 1 Washburn, Real Prop. 648; 2 Bl. Com. 150.

² 2 Min. Insts. 202, 203; 2 Bl. Com. 150, notes (10), (11); *Right v. Darby*, 1 T. R. 159; *Hyatt v. Griffiths*, 17 Q. B. 505; *Doe v. Smaridge*, 7 Q. B. 957; *Miller v. Shackelford*, 4 Dana (Ky.) 278.

³ 1 Washburn, Real Prop. 649.

⁴ *Benedict v. Morse*, 10 Metc. (Mass.) 223; *Creech v. Crockett*, 5 Cush. (Mass.) 133; *Elliott v. Stone*, 1 Gray (Mass.) 571; *Williams v. Ladew*, 171 Pa. 369, 33 Atl. 329; *Hemphill v. Flynn*, 2 Pa. 144; *Howard v. Carpenter*, 22 Md. 10.

⁵ *Simkin v. Ashurst*, 1 Cr., M. & R. 261.

⁶ *Hyatt v. Wood*, 4 Johns. (N. Y.) 150, 40 Am. Dec. 258.

⁷ 2 Min. Insts. 203; 2 Bl. Com. 150; *Dorrell v. Johnson*, 17 Pick. (Mass.) 263.

⁸ 2 Bl. Com. 150; *Dorrell v. Johnson*, 17 Pick. (Mass.) 263; *Russell v. Fab-yan*, 34 N. H. 218.

§ 344. **Termination of Tenancy by Sufferance.** Since the tenant by sufferance has no real interest in the land, he can interpose no objection to a (peaceable) entry upon the premises at any time by the owner and his resumption of the possession, though it be done without giving the holdover tenant notice.⁹ But if, instead of a peaceable entry, the landlord resort immediately to an action of ejectment or a writ of unlawful detainer, the tenant by sufferance may defend at common law upon the ground that the owner must first enter, or demand the possession, before he can sue therefor. The reason is that the law, which presumes no wrong in any man, supposes the tenant to continue in possession, *prima facie* at least, by as lawful a title as that under which he first took possession, unless the owner of the land by some public and avowed act, such as an entry or a demand of the possession, declares his continuance in possession to be tortious and unlawful.¹⁰

A tenancy by sufferance is also terminated by an assignment of the premises; the assignment passing nothing at all. The assignee, if put in possession, is a mere trespasser, and holds, not under the owner, but adversely to him; and if the possession be continued long enough it will ripen into a title under the statute of limitations.¹¹ These consequences do not attach to the possession of the tenant by sufferance himself, however long continued, for he is holding under the owner, and not adversely.¹² But after the owner's entry upon the premises, or his demand of the possession, the holdover tenant then becomes a trespasser if he remain there, and his possession becomes adverse.¹³

§ 345. **Landlord's Liability for Forcible Expulsion of Tenant by Sufferance.** In the United States the statutes generally expressly provide for the recovery of land by the writ of forcible entry in cases where one, no matter how good or bad his title may be, is forcibly ejected from land by another; and this statute would undoubtedly embrace the case of a tenant by sufferance forcibly ejected from the premises by the landlord, and give the tenant the right to recover the possession.

But while the tenant may thus recover the possession upon a writ of forcible entry, and while the owner may even be liable crim-

⁹ 1 Washburn, Real Prop. 651.

¹⁰ 2 Min. Insts. 203; 2 Bl. Com. 150, notes (10), (11).

¹¹ 1 Washburn, Real Prop. 654; *Nepeau v. Doe*, 2 M. & W. 911; *Reckhow v. Schanck*, 43 N. Y. 448.

¹² 1 Washburn, Real Prop. 653; *Doe v. Hull*, 2 Dowl. & R. 38; *Edwards v. Hale*, 9 Allen (Mass.) 464, 465; *Colvin v. Warford*, 20 Md. 396; *Gwynn v. Jones*, 2 Gill & J. (Md.) 173.

¹³ *Butcher v. Butcher*, 7 B. & Cr. 399; *Curl v. Lowell*, 19 Pick. (Mass.) 27.

inally for his breach of the peace, the better opinion is that he is not liable in a civil action for trespass, nor for assault and battery, nor for injury to the occupant's goods.¹⁴

§ 346. Liability of Tenant by Sufferance for Rent. The very gist of a tenancy by sufferance is that there is no privity of contract nor of estate between the owner and the tenant, for the tenant is not in possession by contract, nor has he any estate which he can transfer or transmit, or which can be enlarged by release.¹⁵ Indeed, it differs from all other tenancies in this very respect, that there is no agreement, express or implied, under which it exists. The moment the possession is held under an agreement, it becomes a tenancy at will or from year to year, and ceases to be a tenancy by sufferance.¹⁶

Hence it follows that a tenant by sufferance cannot be held liable for rent, however long continued his possession, because a liability for rent supposes that he is in possession by agreement, express or implied, which is inconsistent with a tenancy by sufferance.¹⁷ This doctrine has been altered in England by statute,¹⁸ and in some of the states of this country.

But while no rent, as such, can be recovered of a tenant by sufferance, and no action of assumpsit for use and occupation lies against him (because he is not in by contract), the mesne profits accruing during his occupation may be recovered as damages in an action of trespass or of ejectment.¹⁹

If, however, the tenant by sufferance offers and the landlord accepts rent, the tenancy is at once converted into a tenancy from year to year.²⁰

¹⁴ 1 Washburn, Real Prop. 655 et seq.; *Harvey v. Brydges*, 14 M. & W. 442; *Burling v. Read*, 11 Q. B. 904; *Hyatt v. Wood*, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; *Jackson v. Morse*, 16 Johns. 197, 8 Am. Dec. 306; *Jackson v. Farmer*, 9 Wend. (N. Y.) 201; *Overdeer v. Lewis*, 1 Watts & S. (Pa.) 90, 37 Am. Dec. 440; *Johnson v. Hannahan*, 1 Strob. (S. C.) 313; *Lackey v. Holbrook*, 11 Mete. (Mass.) 458; *Sampson v. Henry*, 13 Pick. (Mass.) 36; *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272; *Zell v. Ream*, 31 Pa. 304; *Tribble v. Frame*, 7 J. J. Marsh. (Ky.) 601, 23 Am. Dec. 439. But see *Whittaker v. Perry*, 38 Vt. 107; *Wilder v. House*, 48 Ill. 280.

¹⁵ 1 Washburn, Real Prop. 651.

¹⁶ 1 Washburn, Real Prop. 651.

¹⁷ 2 Min. Insts. 202, 203; *Emmons v. Scudder*, 115 Mass. 367; *Harter v. Mullen*, 159 N. Y. 28, 53 N. E. 700, 44 L. R. A. 703, 70 Am. St. Rep. 517, note; *Russell v. Fabyan*, 34 N. H. 223; *Griffin v. Knisely*, 75 Ill. 411. See *Panton v. Jones*, 3 Campb. 372.

¹⁸ 4 Geo. II, c. 28, providing that a tenant holding over without the owner's assent shall be liable to pay double rent.

¹⁹ 1 Washburn, Real Prop. 652; *Sargent v. Smith*, 12 Gray (Mass.) 426; *Raymond v. Andrews*, 6 Cush. (Mass.) 265.

²⁰ Post, § 347; *Hall v. Myers*, 43 Md. 446; *Blumenberg v. Myres*, 32 Cal. 93, 91 Am. Dec. 561; *Allen v. Bartlett*, 20 W. Va. 46.

CHAPTER XVII.

ESTATES FROM YEAR TO YEAR.

§ 347. Origin and Nature of Estates from Year to Year.

348. The Notice to Quit.

349. Waiver of the Notice.

§ 347. **Origin and Nature of Estates from Year to Year.** Because of the uncertainty attendant upon the termination of estates at will and the injustice to the landlord attendant upon estates by sufferance, the courts have for more than a century past endeavored to evade these inconveniences, by construing such estates, wherever possible, to be tenancies from period to period; and from the circumstance that leases and rent are generally measured by yearly periods, they are usually known as estates from year to year, though in a particular case the period may be shorter, as from quarter to quarter, from month to month, etc.¹

Every general letting, if the lessor accepts yearly rent or rent measured by any aliquot part of a year, if not expressed to be an estate at will, is an estate from year to year. Hence, where a tenant for years or *pur auter vie* holds over, and the lessor receives rent from him, he becomes thereby a tenant from year to year, though until the payment of rent he is a tenant by sufferance. So, if the lessee of a tenant for life continues to hold after the termination of his lessor's estate, and the remainderman receives rent from him, he is a tenant from year to year. So, whilst a parol lease for a term exceeding five years, or of freehold, and possession given thereunder, makes a tenancy at will until rent is paid, it then becomes a tenancy from year to year.²

And upon like principles there may be a demise from month to month, or from week to week, or from quarter to quarter, etc., where the terms of the agreement indicate such a holding.³

¹ 2 Min. Insts. 200, 201; 1 Washburn, Real Prop. 633 et seq.

² 2 Min. Insts. 200, 201; 2 Bl. Com. 147, note (7); 1 Th. Co. Lit. 648, note (27), (F); 1 Washburn, Real Prop. 634; Doe v. Bell, 5 T. R. 471; Doe v. Samuel, 5 Esp. 173; Richardson v. Langridge, 4 Taunt. 128; Harrison v. Middleton, 11 Grat. (Va.) 527, 548; Williamson v. Paxton, 18 Grat. (Va.) 475, 497; Peirce v. Grice, 92 Va. 763, 767, 24 S. E. 392; Thomas v. Nelson, 69 N. Y. 118; Laughran v. Smith, 75 N. Y. 205; Shepherd v. Cummings, 1 Cold. (Tenn.) 354; Laguerenne v. Dougherty, 35 Pa. 45; Crommelin v. Thiess, 31 Ala. 418, 70 Am. Dec. 499. See Herter v. Mullen, 159 N. Y. 28, 53 N. E. 700, 44 L. R. A. 703, 70 Am. St. Rep. 533, note.

³ 2 Min. Insts. 201; 2 Bl. Com. 147, note (8); Kemp v. Derrett, 3 Campb. 511.

Tenancies from year to year do not, like estates at will, terminate upon the death of either party, or of both, nor at the mere will of either, but, once commenced, continue until terminated by the proper legal notice, even though the premises or the reversion be assigned to another.⁴ Although indeterminate as to duration until notice is given, they belong to the class of estates for years; the term, after notice, being regarded as for a definite period, expiring with the time of the notice. It therefore goes to the personal representative of the tenant upon his death.⁵ Indeed, all the rights and liabilities ordinarily devolving upon a tenant for years devolve in like manner upon a tenant from year to year, save only that the tenancy does not terminate at a time certain, but only after proper notice. Thus, a tenant from year to year, like a tenant for years, has a right to the possession of the premises, in the absence of a contrary stipulation, even exclusive of the landlord himself, and may sue the latter for trespass if he enters thereon without permission.⁶ And if the tenant from year to year holds over after his estate is terminated by due notice, he is a tenant by sufferance, as a tenant for years would be in like case, until rent is paid and accepted, when he again becomes a tenant from year to year, as before.⁷

It is a general rule controlling estates from year to year that the tenant holding over under a prior lease, after becoming a tenant from year to year, continues to enjoy the benefit and to bear the burden of all the stipulations contained in the original lease, not inconsistent with the new tenancy by which he holds.⁸ Thus, if the tenant has held over under a lease providing that the tenant shall make all necessary repairs, and by the payment of rent he becomes a tenant from year to year, he is presumed to have continued that obligation.⁹

⁴ 2 Min. Insts. 201; *Batting v. Martin*, 1 Campb. 317; *Pleasant v. Benson*, 14 East, 234. But as to the assignee of the reversion, see *Hemphill v. Giles*, 66 N. C. 512.

⁵ 2 Min. Insts. 201; 1 Washburn, Real Prop. 637; *Doe v. Porter*, 3 T. R. 13; *Doe v. Wood*, 14 M. & W. 682; *Cody v. Quarterman*, 12 Ga. 386; *Pugsley v. Aikin*, 11 N. Y. 494; *Kitchen v. Pridgen*, 48 N. C. 49, 64 Am. Dec. 593.

⁶ *Moore v. Boyd*, 24 Me. 242; *Cunningham v. Horton*, 57 Me. 422; ante, § 334. He also continues liable at common law, as a tenant for years would, for the rent though the premises burn down. *Izon v. Gorton*, 5 Bing. N. C. 501.

⁷ 1 Washburn, Real Prop. 637; *Selden v. Camp*, 95 Va. 527, 28 S. E. 877.

⁸ 2 Min. Insts. 200; *Peirce v. Grice*, 92 Va. 763, 767, 24 S. E. 392.

⁹ *Doe v. Amey*, 12 Ad. & E. 476; *Richardson v. Gifford*, 1 Ad. & E. 52. He is not bound to make repairs in the absence of a stipulation to that effect. *Gott v. Gandy*, 2 El. & B. 845.

So, if the tenant has originally come into possession under a parol lease for a term required by the statute of frauds to be created by a written instrument, which before payment of rent makes him a tenant at will and after such payment a tenant from year to year,¹⁰ he is governed by the stipulations contained in the parol lease, which are not inconsistent with his estate from year to year.¹¹

§ 348. **The Notice to Quit.** Notice that the tenant must or will quit the premises is the method adopted by the law—and the sole method—of terminating a tenancy from year to year. This notice constitutes the all-sufficient device to prevent injustice to either party by the sudden termination of the estate.¹²

At common law, if the tenancy be strictly one from year to year, the period of notice is six calendar months, expiring always at the end of some current year of the tenancy; that is, the notice must be given at least six months before the end of some current year. Such notice is sufficient, at common law, if it be by parol, unless stipulated otherwise; but it is always advisable to give it in writing. And if there be any doubt as to the time when the year ends, it is prudent to give the notice to take effect "at the expiration of the current year of the tenancy, which shall expire next after the end of one-half year from the service of the notice."¹³

The notice should be served, at common law, on the landlord's own tenant, and not on a sublessee of the tenant, and it may be served either personally or upon a servant or other responsible person at the dwelling house of the tenant. If merely left on the premises, it is not sufficient, unless it appear that it came to the tenant's hands.¹⁴

¹⁰ Ante, § 320.

¹¹ 2 Min. Insts. 201; Doe v. Bell, 5 T. R. 471; Currier v. Barker, 2 Gray (Mass.) 224; Hollis v. Pool, 3 Metc. (Mass.) 350; Schuyler v. Leggett, 2 Cow. (N. Y.) 660; Barlow v. Wainwright, 22 Vt. 88, 52 Am. Dec. 79.

¹² 2 Min. Insts. 201; 2 Bl. Com. 147, note (7); 1 Washburn, Real Prop. 638. See 2 Taylor, Landl. & Ten. § 466 et seq. The only exception seems to be where the tenancy originates as an estate at will by implication under a parol lease, conveyance or contract. In such case, it seems, the tenancy from year to year may terminate without notice at the end of the term named in the parol lease. 2 Taylor, Landl. & Ten. § 469; 1 Tiffany, Real Prop. § 59; Doe v. Browne, 8 East, 165; Tress v. Savage, 4 El. & B. 36; Thurbee v. Dwyer, 10 R. I. 355; Garrett v. Clark, 5 Or. 464; Morehead v. Watkyns, 5 B. Mon. (Ky.) 228; Barlow v. Wainwright, 22 Vt. 88, 52 Am. Dec. 79.

¹³ 2 Min. Insts. 201; 2 Bl. Com. 147, note (8); 1 Th. Co. Lit. 648, note (F); 1 Washburn, Real Prop. 639. The notice must also be direct and positive, not in the alternative, as to quit or pay the rent, etc., nor conditional. 1 Washburn, Real Prop. 640; Baltimore Dental Ass'n v. Fuller, 101 Va. 627, 44 S. E. 771.

¹⁴ 1 Washburn, Real Prop. 642. But, even though the notice be insufficient for any reason, the party to whom it is given may, by his conduct, be estopped

In case of a tenancy from quarter to quarter, month to month, etc., the common-law period of notice is inapplicable, but the principle is the same and there must still be notice to quit; the period of the notice being in general measured by the length of the term, as a quarter's notice for tenancies from quarter to quarter, a month's notice for tenancies from month to month, etc.¹⁵

§ 349. **Waiver of Notice.** Where notice to quit has been given, it may be waived by the party giving the notice, in which case the situation will remain as if no notice had ever been given. Such waiver may be either express or implied. On the lessor's part, it may be implied (1) from a subsequent acceptance of rent from the tenant, or (2) a distress or action instituted by him for rent accruing subsequently to the expiration of the notice, or (3) from the subsequent giving of a new notice to take effect at a later period than the first. On the lessee's part, notice to quit given by him may be waived (1) by paying rent subsequently accrued, or (2) by giving a new notice.¹⁶

But the acceptance by the lessor, after notice, of rent due at the time of notice, does not alter the effect of the notice given.¹⁷ Nor, it is said, is the mere demand by the lessor of rent accruing after the expiration of the notice of itself a waiver of the notice.¹⁸

to deny its sufficiency. See *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771.

¹⁵ 1 Washburn, Real Prop. 643; 1 Taylor, Landl. & Ten. § 57; *Right v. Darby*, 1 T. R. 159; *Doe v. Hazell*, 1 Esp. 94; *Sanford v. Harvey*, 11 Cush. (Mass.) 93; *People v. Darling*, 47 N. Y. 666; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616; *Hollis v. Burns*, 100 Pa. 206, 45 Am. Rep. 379; *Jones v. Willis*, 53 N. C. 430; *Steffens v. Earl*, 40 N. J. Law, 128, 29 Am. Rep. 214; *Coomler v. Hefner*, 86 Ind. 108; *McDevitt v. Lambert*, 80 Ala. 536, 2 South. 438.

¹⁶ 2 Min. Insts. 202; 1 Washburn, Real Prop. 638; 1 Th. Co. Lit. 650, note (F); *Goodright v. Cordwent*, 6 T. R. 219; *Zouch v. Willingale*, 1 H. Bl. 311; *Doe v. Palmer*, 16 East, 53; *Collins v. Canty*, 6 Cush. (Mass.) 415; *Hoff v. Baum*, 21 Cal. 120.

¹⁷ *Kimball v. Rowland*, 6 Gray (Mass.) 224.

¹⁸ 1 Washburn, Real Prop. 639; *Blyth v. Dennett*, 13 C. B. 178.

CHAPTER XVIII.

LANDLORD AND TENANT.

- § 350. Landlord's Obligations to Strangers.
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§ 350. Landlord's Obligations to Strangers. So far as third parties are concerned, the obligations of both landlord and tenant towards them arise in the main either from negligence or from the maintenance of a nuisance on the leased premises.

As a general rule, the landlord is not responsible to strangers for the negligent use of the premises while in the possession of the tenant.¹

¹ 1 Taylor, Landl. & Ten. § 175; Cheetham v. Hampson, 4 T. R. 318; Eakin v. Brown, 1 E. D. Smith (N. Y.) 36; City of New York v. Corlies, 2 Sandf. Ch.

But if, at the time of the lease, there exists a nuisance upon the premises, even though it only becomes active and deleterious by the tenant's ordinary use and occupation of the premises, the landlord is liable to any person injured thereby, the lessee being apparently regarded as the lessor's agent.² Thus the owner of a mill was made liable for injuries to one whose horse was frightened by the sails of the mill, though it was at the time being operated by a tenant.³ And in another case the landlord was held liable for the tenant's act in polluting a water course by discharging sink water therein, the leased building being adapted to be used in that way.⁴ Of course, the tenant in such cases might be liable also.

In other cases the sole responsibility may rest upon the landlord, as where injuries result to a third party from the faulty or defective construction of a leased building,⁵ or from its ruinous condition at the time of the demise.⁶ And even though there be no defect at the time of the lease, if the landlord still holds, or should resume during the term, control of the premises in respect to the matter that has caused the injury, he is liable for injuries to third persons resulting therefrom.⁷ Thus, where an elevator upon leased premises (run by the lessee's servant) was to be kept in repair exclusively by the

(N. Y.) 301; *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *Cleveland Co-operative Stove Co. v. Wheeler*, 14 Ill. App. 112.

² *Jackman v. Arlington Mills*, 137 Mass. 277; *Fish v. Dodge*, 4 Denio (N. Y.) 311, 47 Am. Dec. 254; *House v. Metcalf*, 27 Conn. 631; *Owings v. Jones*, 9 Md. 108.

³ *House v. Metcalf*, 27 Conn. 631.

⁴ *Jackman v. Arlington Mills*, 137 Mass. 277.

⁵ *King v. Pedley*, 1 Ad. & E. 827; *Learoyd v. Godfrey*, 138 Mass. 315; *Larue v. Farren Hotel Co.*, 116 Mass. 67; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Scott v. Simons*, 54 N. H. 426. See *Edwards v. New York & H. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659.

⁶ *Todd v. Flight*, 9 C. B. (N. S.) 377; *Nelson v. Brewery Co.*, L. R. 2 C. P. Div. 311; *City of Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683; *Marshall v. Heard*, 59 Tex. 266. So, if the landlord knowingly demises the premises for a purpose for which they are unfit, he may be liable to strangers for injuries resulting from such use by the tenant. *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Owings v. Jones*, 9 Md. 108; *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404; *Helwig v. Jordan*, 53 Ind. 21, 21 Am. Rep. 189. Upon the same principle one who erects a building on his premises for purposes of public exhibitions, such as a theatre, and leases the same, is yet liable to third persons for injuries resulting from his negligence in not exercising due care in its erection and in not insuring that it is reasonably fit for the purpose. *Francis v. Cockrell*, L. R. 5 Q. B. 501. See *Edwards v. New York & H. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659.

⁷ *Leslie v. Pound*, 4 Taunt. 649; *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293; *Cannavan v. Conklin*, 1 Daly (N. Y.) 509; *Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124, 3 L. R. A. 458, 10 Am. St. Rep. 260; *Sinton v. Butler*, 40 Ohio St. 158.

lessor, it was held that the lessor, not the lessee, was responsible for an injury to a third person resulting from a defect that should have been repaired.⁸ So, if the lessor is under covenant to repair, and the injury to a third person has arisen from this want of repair, though the tenant is liable in the first instance, the landlord may be directly sued by the party injured in order to avoid circuity of action.⁹

§ 351. Tenant's Obligations to Strangers—Discussion Outlined. The tenant's obligations to third persons spring in general from his duty to keep the premises in repair and so to use the property in his possession as not to cause injury to others.¹⁰ If it be in the tenant's power legally to have remedied the defect or cause of the injury, it is in no case a defense to an action against the tenant that the defect or cause of the injury should under the contract have been remedied by the lessor.¹¹

Under this head, three cases may arise: (1) Where the third person injured is not upon the premises at all, as a passer-by upon the street; (2) where he is upon the premises by invitation or license; and (3) where he is a trespasser or intruder.

§ 352. Same—1. Third Person Injured Not upon the Leased Premises. The tenant is liable to third persons, even though they be not on the leased premises at all, for injuries resulting to them from the careless and negligent use or management of the leased property. Thus, if a passer-by is injured by the tenant's failure to keep the area in front of his house fenced properly, or the cellar doors opening upon the street sufficiently closed, the tenant is liable for injuries resulting from his negligence.¹² And so, if he directs

⁸ *Sinton v. Butler*, 40 Ohio St. 158.

⁹ *Regina v. Watts*, 1 Salk. 357; *Russell v. Shenton*, 3 Q. B. 449; *Nelson v. Brewery Co.*, L. R. 2 C. P. Div. 311; *Payne v. Rogers*, 2 H. Bl. 350; *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Inhabitants of Milford v. Holbrook*, 9 Allen (Mass.) 17, 85 Am. Dec. 735; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238. But see *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594; *Clyne v. Helmes*, 61 N. J. Law, 358, 39 Atl. 767; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767. But these responsibilities do not extend necessarily to such persons as are upon the premises unlawfully or contrary to order. See *Roulston v. Clark*, 3 E. D. Smith (N. Y.) 366; *Daley v. Norwich & W. R. Co.*, 26 Conn. 591, 68 Am. Dec. 413; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Lafayette & I. R. Co. v. Adams*, 26 Ind. 370; *Zoebisch v. Tarbell*, 10 Allen (Mass.) 385, 87 Am. Dec. 660.

¹⁰ 1 Taylor, Landl. & Ten. § 192. The lawfulness of the possession is immaterial. *Feital v. Middlesex Ry. Co.*, 109 Mass. 398, 12 Am. Rep. 720.

¹¹ *Caldwell v. Slade*, 156 Mass. 84, 30 N. E. 87; *Hussey v. Ryan*, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772; *Rosenfield v. Arrol*, 44 Minn. 395, 46 N. W. 768, 20 Am. St. Rep. 584; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422.

¹² 1 Taylor, Landl. & Ten. § 192.

his servant to remove snow or ice from the roof, who negligently throws the same down into the street, injuring a passer-by,¹³ or if he maintains a nuisance upon the premises, such as a sink or cess-pool, from which polluted water filters upon his neighbor's land, injuring a cellar or a well, or causing ill health.¹⁴

§ 353. **Same—2. Third Person upon the Premises by Invitation or License.** If a third person is upon the premises by the invitation of the tenant, express or implied, or by his permission or license, the tenant is bound to exercise reasonable care to prevent damage to such person arising from any defect in the construction of the building which he knows of, or has reason to apprehend.¹⁵ But he is not liable for injuries which ordinary precautions on the part of the stranger might have prevented. Thus, where the plaintiff, for want of a light, fell down an ordinary stairway in a dark passage, and was injured, it was held he could not recover, though the tenant's servant had directed him to go where he did.¹⁶

§ 354. **Same—3. Third Person a Trespasser or Intruder on the Premises.** A tenant is in general under no obligation to make or keep the premises in safe condition, so far as concerns strangers who are willfully or negligently trespassing or intruding thereon without permission. In such cases, even though the tenant be negligent, he is not generally liable,¹⁷ unless the negligence be so gross as to imply a wanton disregard of consequences or a malicious design to injure.¹⁸

§ 355. **The Mutual Obligations of Landlord and Tenant Toward One Another—I. Landlord's Duty to Furnish Habitable Premises.** A lessee of land is a quasi purchaser, and as such is bound to inspect the property before leasing it. He is subject to the principle of caveat emptor. The law implies no warranty on the part of the lessor as to the condition of the premises, and the lessee cannot complain that they were not, at the commencement of the tenancy, in a habitable condition, or were not adapted to the tenant's purposes.¹⁹

¹³ Althorff v. Wolfe, 22 N. Y. 366.

¹⁴ Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56.

¹⁵ Carleton v. Franconia Iron & Steel Co., 99 Mass. 216; Philadelphia, W. & B. R. Co. v. Kerr, 25 Md. 521.

¹⁶ Wilkinson v. Farrie, 1 Hurlst. & C. 633.

¹⁷ 1 Taylor, Landl. & Ten. § 194; Roulston v. Clark, 3 E. D. Smith (N. Y.) 366. But see Daley v. Norwich & W. R. Co., 26 Conn. 591, 68 Am. Dec. 413.

¹⁸ Lafayette & I. R. Co. v. Adams, 26 Ind. 76.

¹⁹ Doyle v. Union Pac. R. Co., 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223; Bowe v. Hunking, 135 Mass. 380, 46 Am. Rep. 471; Franklin v. Brown, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744; Clifton v. Montague,

But the principle of caveat emptor applies only to those defects which might be discovered by the tenant upon inspection. It does not extend to cases where the premises contain concealed defects of construction, or are infected with contagious or infectious disease, which, though known to the landlord, were unknown to the tenant and not discoverable by inspection.²⁰

§ 356. II. Duty of Making Repairs. It is an obvious duty of the tenant, in the absence of contrary stipulation, to return the premises to the landlord at the end of his term in substantially the same condition as when they were received by him, excepting only the deterioration naturally resulting from lapse of time and ordinary wear and tear, because such damage would occur whether the premises were in the possession of the landlord or the tenant, and cannot be justly ascribed to the latter, and he is not to be held liable therefor.²¹

But if the premises are injured by the tenant's own voluntary acts or by his negligence such injury is denominated waste, and he must repair the damage or be liable therefor.²² Furthermore, though the injury be not primarily the result of his own act or negligence, as where the roof is blown off by a tempest (an act of God), or a room

40 W. Va. 207, 21 S. E. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449; Moore v. Weber, 71 Pa. 429, 10 Am. Rep. 708; Maywood v. Logan, 78 Mich. 135, 43 N. W. 1052, 18 Am. St. Rep. 431. In England, however, there seems to be an exception made in the case of a lease of a furnished house, on the ground that a warranty is there implied that the house is fit for immediate habitation. Smith v. Marrable, 11 M. & W. 5; Wilson v. Hatton, 2 Exch. Div. 336. And the same exception has been recognized in Massachusetts. Ingalls v. Hobbs, 156 Mass. 348, 31 N. E. 286, 16 L. R. A. 51, 32 Am. St. Rep. 460. But it has been generally repudiated in this country. See Murray v. Albertson, 50 N. J. Law. 167, 13 Atl. 394, 7 Am. St. Rep. 787; Fisher v. Lighthall, 4 Mackey (D. C.) 82, 54 Am. Rep. 258; Daly v. Wise, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236; Franklin v. Brown, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744.

²⁰ Doyle v. Union Pac. R. Co., 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223; Cowen v. Sunderland, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469; Daly v. Wise, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236; Maywood v. Logan, 78 Mich. 135, 43 N. W. 1052, 18 Am. St. Rep. 431; Anderson v. Hays, 101 Wis. 538, 77 N. W. 891, 70 Am. St. Rep. 930, note; Hamilton v. Feary, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485. Indeed, some of the authorities indicate that the landlord may be held liable for injuries to the tenant resulting from concealed defects of which the landlord has no knowledge, if by due diligence he might have discovered them. Willcox v. Hines, 100 Tenn. 538, 46 S. W. 297, 41 L. R. A. 278, 66 Am. St. Rep. 770, note; Albert v. State, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159.

²¹ 1 Taylor, Landl. & Ten. § 343; United States v. Bostwick, 94 U. S. 53, 24 L. Ed. 65.

²² Post, § 380 et seq.

is flooded by the bursting of a pipe, he is bound as speedily as possible so to repair the roof or the pipe—temporarily, at least—as to prevent further damage, or else he is responsible for such further damage, as for permissive waste.²³ But he is not, in such case, in the absence of agreement, bound to restore things to their original condition, nor to substitute new structures for old, his only obligation being to prevent further damage.²⁴ Except by virtue of this liability for waste, the tenant is not otherwise required to repair in the absence of covenant or agreement to that effect.

And the landlord, in the absence of covenant, is never bound to keep the leased premises in repair, since in contemplation of law the tenant has purchased the premises from the landlord for the period during the tenancy.²⁵

§ 357. III. Tenant's Estoppel to Deny Landlord's Title. Few principles in the law of landlord and tenant are more firmly established than that a lessee put in possession of land by his lessor shall not, so long as he retains possession under the lease, be permitted to deny that the lessor had title to the premises at the time he made the lease in any action brought against him by the lessor to recover possession of the premises or to recover the rent reserved in the lease.²⁶

By the original common law such an estoppel arose only where the lease was by deed indented (that is, under the seal of the lessee as well as of the lessor). It was effective only against the lessee

²³ *Suydam v. Jackson*, 54 N. Y. 450; *Townshend v. Moore*, 33 N. J. Law, 284; *Hitner v. Ege*, 23 Pa. 305.

²⁴ *United States v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65; *Smith v. Kerr*, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; *Johnson v. Dixon*, 1 Daly (N. Y.) 178; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Earle v. Arbogast*, 180 Pa. 409, 36 Atl. 923; *Long v. Fitzsimmons*, 1 Watts & S. (Pa.) 530. For his liability under an express covenant to repair, see post, § 370.

²⁵ 2 Min. Insts. 193; *Viterbo v. Friedlander*, 120 U. S. 707, 7 Sup. Ct. 962, 30 L. Ed. 776; *Foster v. Peyser*, 9 Cush. (Mass.) 242, 57 Am. Dec. 43; *Witty v. Matthews*, 52 N. Y. 512; *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708; *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 651; *Petz v. Voigt Brewery Co.*, 116 Mich. 418, 74 N. W. 651, 72 Am. St. Rep. 531. But though the landlord be not bound to repair, yet if he voluntarily undertakes to do so, and does the work so negligently that the tenant is thereby damaged, the latter may hold the landlord responsible. *Riley v. Lissner*, 160 Mass. 330, 35 N. E. 1130; *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466.

²⁶ 2 Min. Insts. 763; 2 Taylor, Landl. & Ten. § 705; *Emerick v. Tavener*, 9 Grat. (Va.) 220, 58 Am. Dec. 217; *Turpin v. Saunders*, 32 Grat. (Va.) 27; *Merryman v. Bourne*, 9 Wall. 599, 19 L. Ed. 683; *Bailey v. Kilburn*, 10 Metc. (Mass.) 176, 43 Am. Dec. 423; *Tillotson v. Doe ex dem. Kennedy*, 5 Ala. 407, 39 Am. Dec. 330.

himself, and lasted during the term named in the lease, and was applicable even though the tenant has not occupied the premises, for "by the making of the lease the estoppel doth grow."²⁷

But in modern times the estoppel has been extended so as to embrace estoppel in pais as well as estoppel by deed, and is therefore no longer confined to cases where the lease is by deed indented. It is based upon a very sensible and often applied principle of reason and honesty, that one shall not be permitted, in general, to deny, when he wishes to avoid a liability, a fact which he has previously admitted by words or conduct in order to obtain a benefit. Thus, one who has hired a horse of A. and has obtained the advantage he thereby sought, cannot say, when called upon to pay the hire or to return the horse, that it is not A.'s horse. Such denials savor for the most part of bad faith, and, as between landlord and tenant especially, are generally recognized as inadmissible. The doctrine extends in like manner to persons claiming under either party, as a privy in estate or by contract, such as the heir, personal representative, assignee or subtenant.²⁸

This estoppel in pais is based upon the tenant's possession by permission of the landlord, and is entirely independent of the instrument of lease or the duration of the term.²⁹ This fact, that the estoppel is based upon the permissive possession of the tenant, is the chief key to the problems that present themselves in this connection. The estoppel continues only so long as this permissive possession continues. Hence the tenant may at any time, upon a surrender of his possession to the landlord, deny the landlord's title from that moment, but he cannot do so as long as he retains such possession, even though the time designated in the lease has expired,³⁰ or though the lease itself be invalid for some reason.³¹

But after a surrender of his possession to the landlord the tenant may set up against him a paramount title acquired by him while

²⁷ 2 Min. Insts. 764; 2 Th. Co. Lit. 410, 415, 416, note (M), 417; Com. Dig. Estoppel (A, 2), (A, 3). See *Lamson v. Clarkson*, 113 Mass. 348, 18 Am. Rep. 498.

²⁸ 2 Min. Insts. 763; *Emerick v. Tavener*, 9 Grat. (Va.) 220, 58 Am. Dec. 217; *Blake v. Sanderson*, 1 Gray (Mass.) 332; *Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Bergman v. Roberts*, 61 Pa. 497; *Blantin v. Whitaker*, 11 Humph. (Tenn.) 313.

²⁹ 1 Taylor, Landl. & Ten. § 89; *Vernam v. Smith*, 15 N. Y. 327. See 1 Tiffany, Real Prop. § 50; 6 Am. Law Rev. 1, 19.

³⁰ *Hilbourn v. Fogg*, 99 Mass. 11; *Vernam v. Smith*, 15 N. Y. 327; *Rogers v. Boynton*, 57 Ala. 501. The fact that the tenant is in possession already when the lease is made is immaterial. *Locke v. Frasher*, 79 Va. 413; *Emerick v. Tavener*, 9 Grat. (Va.) 223, 224, 58 Am. Dec. 217.

³¹ *Ripley v. Cross*, 111 Mass. 41; *Crawford v. Jones*, 54 Ala. 459.

tenant.³² And if the tenant be evicted by title paramount, either actually or constructively, the basis of the estoppel, namely, the tenant's possession by permission of the landlord, is swept away, and he may set up such paramount title in another as against his lessor.³³

It is also to be noted that the title which the tenant is estopped to dispute is that possessed by the landlord at the commencement of the term. Hence he may show that the landlord's title has expired since the beginning of the term, either by its own limitation or by the lessor's transfer thereof,³⁴ or that it has been adjudged invalid, or has been disposed of at a judicial sale.³⁵

Upon the same principle, if one in possession of land is induced by fraud or mistake arising out of misrepresentations to believe that another has a better title and therefore takes a lease from him, the former is not estopped to defend against the recovery of the land by the latter by setting up the mistake and showing he himself has the better title.³⁶

§ 358. IV. Landlord's Duty to Protect Tenant in His Possession. While on the one hand, as has just been pointed out, the tenant is estopped to deny the landlord's title, it is on the other hand equally the landlord's duty to defend and maintain the tenant's right to the possession of the land leased.³⁷ To this end the law implies a covenant on the lessor's part, merely from the relation of landlord and tenant and independently of the form of the lease, whether written or oral, or of the words in which it is expressed, to the effect

³² 2 Min. Insts. 764; 1 Tiffany, Real Prop. § 50; Gable v. Wetherholt, 116 Ill. 313, 6 N. E. 453, 56 Am. Rep. 774; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

³³ 2 Min. Insts. 763; George v. Putney, 4 Cush. (Mass.) 351, 50 Am. Dec. 788; Chambers v. Pleak, 6 Dana (Ky.) 426, 32 Am. Dec. 78.

³⁴ 2 Min. Insts. 763; Lamson v. Clarkson, 113 Mass. 348, 18 Am. Rep. 498; Hilbourn v. Fogg, 99 Mass. 11; Jackson v. Rowland, 6 Wend. (N. Y.) 666, 22 Am. Dec. 557; Smith v. Mundy, 18 Ala. 182, 52 Am. Dec. 221.

³⁵ Elliott v. Smith, 23 Pa. 131; Hodges v. Shields, 18 B. Mon. (Ky.) 828; Lancashire v. Mason, 75 N. C. 455. And this, even though the tenant himself be the purchaser. Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; Jackson v. Rowland, 6 Wend. (N. Y.) 666, 22 Am. Dec. 557; Casey v. Gregory, 13 B. Mon. (Ky.) 505, 56 Am. Dec. 581; Bettison v. Budd, 17 Ark. 546, 65 Am. Dec. 442; McPherson v. McPherson, 33 N. C. 391, 53 Am. Dec. 416.

³⁶ 2 Min. Insts. 763; Locke v. Frasher, 79 Va. 409; Ingraham v. Baldwin, 9 N. Y. 45; Evans v. Bidwell, 76 Pa. 497; Williams v. Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768. In the absence of such fraud or mistake it is otherwise. Lucas v. Brooks, 18 Wall. 436, 21 L. Ed. 779; Williams v. Wait, supra; Prevot v. Lawrence, 51 N. Y. 219; Cobb v. Arnold, 8 Metc. (Mass.) 398; Locke v. Frasher, supra.

³⁷ 2 Min. Insts. 759.

that the lessee shall have quiet enjoyment of the premises during his term.³⁸

But this covenant does not protect the tenant against any acts (short of eviction under paramount title) of a stranger, trespasser or wrongdoer acting without authority from the landlord, but only against the wrongful acts of the lessor himself or the acts of those claiming under a paramount title.³⁹ To constitute a breach thereof, the lessee must have been evicted, either actually or constructively, by the lessor or those claiming under him, or by some person having paramount title.⁴⁰

As to the measure of damages upon an action for a breach of the covenant, the courts are divided. In some states (by analogy to the measure of damages in actions for a breach of the covenant for quiet enjoyment often found in conveyances in fee simple, where the damages are in general limited to the purchase money paid by the grantee, with interest)⁴¹ it is held, in the absence of fraud or fault on the lessor's part, that merely nominal damages may be recovered by the lessee, together with such mesne profits as the lessee has been compelled to pay the true owner, upon the theory that the tenant's release from the further payment of rent is a sufficient reimbursement for his loss of the term.⁴² But in England, and in some of the states of this country, the damages are to be measured by the value of the lease at the time of the eviction.⁴³

³⁸ Rawle, Cov. § 274; *Dunklee v. Webber*, 151 Mass. 408, 24 N. E. 1082; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; *Baugh v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279. Furthermore, a covenant of title (that the lessor has lawful power to make the lease) is implied in case of written leases from the words "demise," "let," or "lease" employed in the instrument. Rawle, Cov. §§ 270, 272. But it seems this latter covenant cannot be implied in an oral lease. Rawle, Cov. § 274; *Vernam v. Smith*, 15 N. Y. 327; *Gano v. Vanderveer*, 34 N. J. Law, 293.

³⁹ *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330, 38 Am. Dec. 637; *Baugh v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279; *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708; *Surget v. Arighi*, 11 Smedes & M. (Miss.) 87, 49 Am. Dec. 46.

⁴⁰ *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522; *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *Moore v. Frankenfield*, 25 Minn. 540; *McAles-ter v. Landers*, 70 Cal. 79, 11 Pac. 505.

⁴¹ Post, § 914.

⁴² 1 Taylor, Landl. & Ten. § 317; *Lanigan v. Kille*, 97 Pa. 120, 39 Am. Rep. 797; *Kelly v. Dutch Church of Schenectady*, 2 Hill (N. Y.) 116; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506.

⁴³ *Lock v. Furze*, L. R. 1 C. P. 441; *Newbrough v. Walker*, 8 Grat. (Va.) 16, 56 Am. Dec. 127; *Dexter v. Manley*, 4 Cush. (Mass.) 14; *Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601; *Clarkson v. Skidmore*, 46 N. Y. 297; *Dobbins v. Duquid*, 65 Ill. 464.

§ 359. V. Reservation of Rent—1. Mode of Reserving Rent.

It is not essential to the validity of a lease that there should be any stipulation for the payment of rent, for a lease is an executed contract and, as between the parties, needs no valuable consideration to support it.⁴⁴ Nor, if rent is reserved, are any particular words necessary for the purpose, though such words as "reserving," "rendering," "returning," "yielding," or "paying" are usual and proper technical terms to indicate that intention; but other words showing the intent will suffice.⁴⁵

Where several distinct premises are leased by one instrument, but the reservation is of one entire rent, the landlord may distrein on either of the premises for the whole rent, or in a proper case may re-enter upon either. But if the reservation be in the first instance several, and not entire, it is otherwise. Thus, a lease of three houses, reserving \$500 as rent, to wit, for one house \$300, for another \$150, and for the third \$50, is an instance of an entire reservation, enabling the lessor to distrein upon any one of the houses for the whole \$500 rent; but a lease of three houses, reserving \$300 for the first, \$150 for the second, and \$50 for the third, is a several reservation, wherein the lessor can only distrein or re-enter upon the premises severally for the respective rents.⁴⁶

If the lease is executed by several persons as lessors, having several titles, although the reservation is by joint words, yet from the nature of the titles it must be understood as a several reservation, upon which they must distrein or re-enter severally. Thus, if two tenants in common make a lease, reserving rent, the reservation, though made by joint words, shall follow the nature of the reversion in the lessors which is several. In the case of joint tenants it would be otherwise.⁴⁷

§ 360. Same—2. Persons to Whom Rent may be Reserved Payable. It is an inflexible rule of the law that the rent stipulated for in the lease must be reserved therein payable to none other than the lessor or his heirs (or if the lessor himself has only an estate for years, the lessor or his personal representative). It may never be reserved payable to a third person, because if reserved to a stranger it would not be a return for the land that passes by the lease, as the

⁴⁴ *Hooton v. Holt*, 139 Mass. 54, 29 N. E. 221; *Hunt v. Comstock*, 15 Wend. (N. Y.) 665; post, § 936.

⁴⁵ 2 Min. Insts. 48; Bac. Abr. Rents (D); Gilbert, Rents, 30, 32, et seq.

⁴⁶ 2 Min. Insts. 48; Gilbert, Rents, 34 et seq. See *Wickham & Northrop v. Richmond Standard Steel, Spike & Iron Co.*, 107 Va. 44, 57 S. E. 647; 11 L. R. A. (N. S.) 836.

⁴⁷ 2 Min. Insts. 48; Gilbert, Rents, 37; Bac. Abr. Rents (E).

definition of a rent reserved demands; and also in order to avoid the danger of maintenance.⁴⁸

§ 361. Same—3. Assignment of Rents and of the Remedies Therefor. As just observed, a rent cannot be originally reserved in the lease payable to a stranger to the title. But once properly reserved to the lessor and his heirs, or to the lessor and his personal representative, as the case may be, it is susceptible of being assigned by him to a stranger, though this could not be done at common law by a direct assignment of the rent itself, leaving the reversion still in the lessor, for the same reason that induced the common law to prohibit the assignment of choses in action and rights of entry or action in lands, namely, the danger of maintenance.⁴⁹

But even at common law it was a well-established principle that "the rent follows the reversion," and hence, if the lessor assigns the reversion to a stranger, the rent *prima facie* passes as incident thereto;⁵⁰ and such stranger assignee of the reversion may recover the rent at common law by distress or by action of debt, but he cannot at common law have the benefit of any right of entry for breach of a condition to pay the rent, or any other condition in the lease, nor a right to maintain an action upon a covenant to pay rent or any other covenant in the lease.⁵¹

These latter privileges were conferred upon the assignee of the reversion by the statute 32 Hen. VIII, c. 34. That statute, which was occasioned by the dissolution of the monasteries and the embarrassments in which the new grantees of the monastery reversions, as well as the tenants of the monastery lands, found themselves involved, gave mutual redress in all cases of landlord and tenant where the landlord has assigned his reversion, in respect to other matters as well as to rent, giving to the owner of the reversion and his assignees on the one side and to the tenant of the land and his assignees on the other a mutual right to take advantage of all conditions and covenants in the lease by re-entry or action.⁵²

§ 362. Same—4. Place and Time for the Payment of Rent. If the place of payment of the rent is designated in the lease, it must

⁴⁸ Ante, § 77; 2 Min. Insts. 49; Bac. Abr. Rents (G); Gilbert, Rents, 54; Oates v. Frith, Hob. 130a; Ege v. Ege, 5 Watts (Pa.) 138; Ryerson v. Quackebush, 26 N. J. Law, 236.

⁴⁹ 2 Min. Insts. 640, 641, 839.

⁵⁰ 2 Min. Insts. 49; Walker's Case, 3 Co. 22; Butt v. Ellett, 19 Wall. 544, 22 L. Ed. 183; Steed v. Hinson, 76 Ala. 298; Dixon v. Niccolls, 39 Ill. 372, 89 Am. Dec. 312.

⁵¹ 2 Min. Insts. 49.

⁵² 2 Min. Insts. 49, 50; 2 Th. Co. Lit. 84, 88, note (M, 2); Spencer's Case, 5 Co. 16a, 1 Smith, Lead. Cas. 68; post, § 375 et seq.

be paid there; ⁵³ otherwise, rent is both demandable and payable on the premises.⁵⁴

As to the time of payment, in the absence of express stipulation on the subject, rent, being a retribution or return for the land leased, is payable at the end of the year, month or other period designated.⁵⁵ If there is an express stipulation, it will control, and if the language is ambiguous it is to be interpreted with reference to the leading fact that the rent is a return for the land leased. Hence, in a lease for years, a reservation of rent "payable at Michaelmas and Lady Day, in even portions," is construed to mean payable annually on those days. And if it be made payable annually, without saying during the whole term, yet it is to be so construed.⁵⁶

As to the hour of the day when rent falls due, it is to be observed that for all purposes connected with the counting of money the common-law rule is that the rent shall be regarded as falling due at or before sunset of the last day, or at least when there is sufficient daylight left to see to count the money. Hence rent must be demanded, tendered or paid at or before this hour.⁵⁷ But for other purposes (as for purposes of distress, action, succession, etc.) rent is not due until midnight of that day. Hence, if a lessor, seised in fee simple, dies between sunset and midnight, the rent falling due on that day goes to his heir and not to his personal representative.⁵⁸

§ 363. **Same—5. Persons Entitled to Rent Not in Arrear.** The most comprehensive and practical plan is to reserve the rent payable during the term, without saying to whom. The law will then distribute it to the persons entitled; that is, to every one to whom the reversion shall appertain.⁵⁹ Hence, if a lessor seised in fee leases, reserving the rent during the term, since upon his death the reversion passes to his heir or devisee, the rent following the reversion passes likewise; and if the lessor himself be possessed only of a term for years, the rent still following the reversion goes to his personal representative.⁶⁰ And so in each case, though the rent be reserved generally, without stating for how long or to whom, since it is a return for the land, it is presumed to be of equal duration with the

⁵³ 2 Min. Insts. 61; Gilbert, Rents, 88 et seq.

⁵⁴ 2 Min. Insts. 61; Gilbert, Rents, 87, 88.

⁵⁵ 2 Min. Insts. 49; Bac. Abr. Rents (F).

⁵⁶ 2 Min. Insts. 49; Bac. Abr. Rents (F).

⁵⁷ 2 Min. Insts. 51; Bac. Abr. Rents (H); Gilbert, Rents, 52; Clun's Case, 10 Co. 127; Ex parte Smyth, 1 Swanst. 343, note.

⁵⁸ 2 Min. Insts. 52, and cases cited supra.

⁵⁹ 2 Min. Insts. 50; Whitlock's Case, 8 Co. 71a; Gilbert, Rents, 64.

⁶⁰ 2 Min. Insts. 53; Gilbert, Rents, 66, 67; Bac. Abr. Rents (H).

demise, and after the lessor's death (and during his lifetime also) belongs to him who has the reversion.⁶¹

If the rent be reserved expressly to the lessor alone (not naming heirs or personal representative) and the lease be for a term of years, upon the principle "*Expressio unius exclusio alterius est*," it goes at common law neither to the heir nor personal representative of the lessor, but ceases altogether at his death.⁶² If, the other circumstances remaining the same, the lease is in fee simple, the lessor still takes only an estate for life in the rent at common law, because of the want of words of inheritance (heirs), which are essential at common law even where the inheritance is created by a reservation.⁶³

Another case of difficulty deserves some attention—where the rent (not made payable expressly throughout the term) is reserved to the lessor and his personal representative, where the heir is the proper party to succeed to the reversion, or vice versa. The law uses all the industry imaginable to conform the reservation to the estate, but this disposition may be thwarted by the terms in which the parties express themselves. Thus, if it appears that the rent is to be paid throughout the term, it will follow the reversion and be payable to him who has that, although it be reserved to the wrong representative. But if it do not clearly appear that the rent was designed to continue during the whole term, and it is expressly reserved to an improper person, as to the executor instead of the heir, or vice versa, the rent will cease upon the lessor's death.⁶⁴

If the rent is reserved payable to one of two joint tenants, a distinction must be noted between the case where the rent is reserved by parol (that is, not under seal) and where it is reserved by deed indented (that is, where both parties unite in the deed). In the former case the rent following the reversion accrues to both joint tenants; in the latter the parties are estopped by their indenture from claiming the rent save in accordance with the deed, and it goes in its entirety to the joint tenant to whom it is reserved.⁶⁵

§. 364. **Same—6. Persons Entitled to Rent in Arrear.** Rent in its technical meaning is a right to a profit, and is readily distinguishable from the arrears of rent, which are the profits themselves and

⁶¹ 2 Min. Insts. 50; Bac. Abr. Rents (H).

⁶² 2 Min. Insts. 50; Gilbert, Rents, 64, 65; Bac. Abr. Rents (H); 2 Th. Co. Lit. 413.

⁶³ Ante, § 144.

⁶⁴ 2 Min. Insts. 51; Gilbert, Rents, 65 et seq.; Bac. Abr. Rents (H); 2 Th. Co. Lit. 413, note (K).

⁶⁵ 2 Min. Insts. 51; Gilbert, Rents, 63.

in all cases personal property or choses in action.⁶⁶ Hence rent fallen due before the lessor's death is never payable to the heir, but always to the personal representative of the lessor.⁶⁷ Nor do the arrears of rent pass upon the assignment of the reversion to an assignee, without express mention.⁶⁸

§ 365. Same—7. Apportionment of Rent—A. In Point of Time. Rent is apportionable or divisible in two aspects: (1) In point of time; (2) in point of amount. The first is to be dealt with in this section.

At common law, rent is not regarded as accruing from day to day, like interest, but is an entire thing and becomes due en masse only upon the day designated for its payment.⁶⁹ Hence, if the landlord is a tenant in fee and dies between two rent days, no part of the rent since the last rent day is yet due, and his personal representative is therefore entitled to none of it, but it all goes to the heir or devisee, the reversioner.⁷⁰ For the same reason, if a landlord assign his reversion between rent days, he ceases to have any claim to the rent subsequently accruing, unless he expressly reserves the same in the assignment.⁷¹ And so, if the tenant be evicted by title paramount from the whole of the leased premises, or by the lessor himself from any part thereof, between rent days, the landlord can at common law claim no part of the rent accrued before the eviction occurred.⁷²

Upon the same principle, if the lessor is himself only a tenant for life, and dies between rent days, his personal representative is at common law entitled to no rent, because there are no arrears of rent until the ensuing rent day, and, being a tenant for life only, no reversion descends to his heir, so that he is not entitled to the rent; nor can the reversioner or remainderman (after the life estate) recover it, for the lease ceases with the death of the life tenant

⁶⁶ Ante, §§ 73, 74; 2 Min. Insts. 39.

⁶⁷ 2 Min. Insts. 53.

⁶⁸ It should be noted that arrears of rent is a chose in action, which could not be assigned at common law. See ante, § 361.

⁶⁹ 1 Tiffany, Real Prop. § 361; Clun's Case, 10 Co. 127a; Sohler v. Eldredge, 103 Mass. 345, 351; Marshall v. Moseley, 21 N. Y. 280; Bloodworth v. Stevens, 51 Miss. 475.

⁷⁰ See authorities, supra.

⁷¹ 2 Min. Insts. 757; Bank of Pennsylvania v. Wise, 3 Watts (Pa.) 394; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Hearne v. Lewis, 78 Tex. 276, 14 S. W. 572.

⁷² 2 Min. Insts. 59; Clun's Case, 10 Co. 127a; Fitchburg Cotton Manufacturing Corp. v. Melven, 15 Mass. 270; Nicholson v. Munigle, 6 Allen (Mass.) 215; Hammond v. Thompson, 168 Mass. 531, 47 N. E. 137; Zule v. Zule, 24 Wend. (N. Y.) 76, 35 Am. Dec. 600. See post, § 441.

lessor,⁷³ and the reversioner or remainderman is at common law entitled only to rent falling due in his time; hence the lessee for years would at common law escape altogether the payment of rent since the last rent day.⁷⁴ But even at common law, if the life tenant die upon the rent day itself, though prior to midnight of that day (at which hour in strictness the rent falls due),⁷⁵ owing to the hardship of the case and upon the principle "*De minimis lex non curat*," an exception is made to the general principle, and the rent is regarded as having already fallen due, and hence goes in full to the lessor's personal representative.⁷⁶

This common-law principle has been changed in England by statute, at least so far as relates to the last case mentioned; that is, where the lessor is tenant for life and his undertenant's estate is terminated by the lessor's death, the statute apportioning the rent in such case between the lessor's personal representative and his reversioner or remainderman.⁷⁷ The matter is also generally regulated by statute in the United States.⁷⁸

§ 366. **Same—B. In Point of Amount.** In pursuance of the rule that the rent follows the reversion, if the landlord assigns his reversion, or part thereof, in parcels to different persons, the rent to fall due after such assignment is to be apportioned among the different owners of the once single reversion.⁷⁹ But the landlord may by express agreement assign the reversion, reserving to himself the rent to fall due thereafter, in which case, of course, there is no reason for apportionment; or, vice versa, he may assign the rent amongst several without assigning the reversion, in which case the rent is to be apportioned among the various assignees according to their rights.⁸⁰

On the other hand, a tenant may assign the land itself to several parties in different parcels, and thus, if the landlord assents to such

⁷³ It would be otherwise if the life tenant had leased under a power permitting him to make leases extending beyond his own life. *Rockingham v. Penrice*, 1 P. Wms. 177.

⁷⁴ *Ante*, § 207; 2 Min. Insts. 52; *Jenner v. Morgan*, 1 P. Wms. 391; *Ex parte Smyth*, 1 Swanst. 339, 340, note; *Clun's Case*, 10 Co. 128a; *Perry v. Aldrich*, 13 N. H. 343, 38 Am. Dec. 493; *Hoagland v. Crum*, 113 Ill. 365, 55 Am. Rep. 424.

⁷⁵ *Ante*, § 362.

⁷⁶ *Ante*, § 207; 2 Min. Insts. 52; *Rockingham v. Penrice*, 1 P. Wms. 180.

⁷⁷ 11 Geo. II, c. 19.

⁷⁸ 1 Stim. Am. Stat. Law, §§ 2027, 2028.

⁷⁹ 2 Min. Insts. 58; Co. Litt. 148a; *West v. Lassels*, 1 Cro. (Eliz.) 851; *Ehrman v. Mayer*, 57 Md. 612; *Worthington v. Cooke*, 56 Md. 51; *Linton v. Hart*, 25 Pa. 193, 64 Am. Dec. 691.

⁸⁰ 1 *Tiffany*, Real Prop. § 362; *Ards v. Watkins*, 1 Cro. (Eliz.) 637; *Rivis v. Watson*, 5 M. & W. 255; *Ryerson v. Quackenbush*, 26 N. J. Law, 236.

assignments, may divide the burden of the rent. But it is worthy of note that a tenant cannot, without the landlord's assent, by an assignment or sublease of the premises lessen his own personal responsibility or that of the whole land for the entire rent due the landlord. Hence an assignment or sublease of part of the land by the lessee, without the lessor's consent, does not affect the landlord's right to distrein chattels on any part of the premises, or to sue the lessee for the entire rent, or to re-enter for breach of an express condition subsequent.⁸¹

Since the rent is a return for the land leased, if the reversion and the leasehold become united in the same person, whether by the tenant's surrender to the reversioner or the reversioner's release to the tenant, or otherwise, the tenant's estate is extinguished by merger, and the rent therefore ceases,⁸² or if there be a transfer of only part of the land to the reversioner, there is a merger pro tanto and an apportionment of the rent results.⁸³

For the same reason, if the tenant is evicted from the premises or part thereof by a stranger under a paramount title, the rent ought to be, and is proportionably reduced.⁸⁴ But if the lessee be evicted by the lessor himself from any, even the least part, of the premises, it operates a suspension of the entire rent during the whole year of the tenancy (or other period for which the rent is reserved) in which the eviction occurs, and that notwithstanding the tenant remains in undisturbed possession of the residue and of much the greater portion of the premises, and soon regains possession of the part of which he was evicted.⁸⁵

⁸¹ Walker's Case, 3 Co. 24a; Broom v. Hore, 1 Cro. (Eliz.) 633; Arnsby v. Woodward, 6 B. & Cr. 519; Wheeler v. Earle, 5 Cush. (Mass.) 31, 51 Am. Dec. 41; Peck v. Ingersoll, 7 N. Y. 528.

⁸² Amory v. Kannoffsky, 117 Mass. 351, 19 Am. Rep. 416; Underhill v. Collins, 132 N. Y. 269, 30 N. E. 576; Terstegge v. First German Benev. Soc., 92 Ind. 82, 47 Am. Rep. 135; Pratt v. H. M. Richards Jewelry Co., 69 Pa. 53; Minneapolis Co-operative Co. v. Williamson, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473.

⁸³ 2 Min. Insts. 58; 1 Th. Co. Lit. 466; Gilbert, Rents, 179; Walker's Case, 3 Co. 22b; Ehrman v. Mayer, 57 Md. 612; Peters v. Newkirk, 6 Cow. (N. Y.) 103; Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; Higgins v. California Petroleum & Asphalt Co., 109 Cal. 304, 41 Pac. 1087. If the rent be indivisible, e. g., a horse, since it cannot be apportioned, it is extinct altogether. 2 Min. Insts. 56; 1 Th. Co. Lit. 471; Gilbert, Rents, 165; Bruerton's Case, 6 Co. 1.

⁸⁴ 2 Min. Insts. 58; 1 Th. Co. Lit. 468; Gilbert, Rents, 148, 149; Clun's Case, 10 Co. 128.

⁸⁵ 2 Min. Insts. 56, 759, 760; 1 Th. Co. Lit. 470, note (H, 1); Gilbert, Rents, 178; Briggs v. Hall, 4 Leigh (Va.) 484, 26 Am. Dec. 326; Tunis v. Grandy, 22 Grat. (Va.) 109, 110, 120. But see 1 Washburn, Real Prop. 348 et seq.

In view of the fact that the law regards the tenant as a quasi purchaser of the premises leased, the rent being the quasi purchase price, a strict adherence to principle would demand that no subsequent destruction of the premises or of any portion thereof, even though without the tenant's fault, should relieve the tenant from responsibility for the price he has agreed to pay. But the common law, making an illogical concession to the hardship of the tenant's situation, abates the rent proportionally, if the very thing out of which the rent issues, the land itself, is partially or wholly destroyed, as where the land is permanently submerged or swept away by water.⁸⁶ Upon this principle, where one leases a room or apartments in a building which is destroyed by fire, he is at common law relieved from his obligation to pay rent, because there is no land leased, strictly speaking, but only the building, out of which the rent issues; the destruction of that bringing the case within the common-law exception.⁸⁷

No such concession, however, was allowed by the common law in the case of a lease of land and buildings, where the buildings were partially or wholly destroyed by fire or other cause, but the tenant must continue to pay the entire rent throughout the term, though he were in no default.⁸⁸

§ 367. VI. The Usual Covenants Contained in Leases—Discussion Outlined. If the parties to a lease wish to bind themselves or each other to duties not required of them by the general law of landlord and tenant, they may do so by inserting the stipulation: (1) In the form of a condition, upon the breach of which the lease may terminate; or (2) in the form of a personal covenant, upon the breach of which the injured party is entitled to sue the other for damages for breach of the covenant; or (3) in the form of a covenant, but with a right of entry reserved in case of a breach, which practically makes it a condition, and assimilates it to the first case.

Conditions contained in leases in no way differ from conditions in other conveyances, and will be discussed at large here-

⁸⁶Ante, § 84; 2 Min. Insts. 58, 59; 1 Th. Co. Lit. 469, note (G, 1); Gilbert, Rents, 187.

⁸⁷See *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Graves v. Berdan*, 26 N. Y. 498; *Stockwell v. Hunter*, 11 Metc. (Mass.) 448, 45 Am. Dec. 220; *Buschman v. Wilson*, 29 Md. 553; *Harrington v. Watson*, 11 Or. 143, 3 Pac. 173, 50 Am. Rep. 465; *Ainsworth v. Ritt*, 38 Cal. 89; *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 424, 61 Am. St. Rep. 570, note.

⁸⁸Ante, § 84; 2 Min. Insts. 60; 1 Th. Co. Lit. 469, note (G, 1); *Ross v. Overton*, 3 Call (Va.) 309, 2 Am. Dec. 552.

after.⁸⁹ They need not be more particularly mentioned in this connection.

Covenants may be either implied or express, and may relate to any lawful subject in the contemplation of the parties. No attempt will be made here to enumerate all the various covenants which may, or even which should, be included in leases. They depend in great measure upon the condition and situation of the leased premises and the circumstances and wants of the parties. Only a few of the more important and frequently recurring will be mentioned.

They will be considered in the following order; (1) The covenants of title; (2) the covenant for rent; (3) the covenant to repair; (4) the covenant not to assign without leave; (5) covenant for re-entry for nonpayment of rent or breach of covenants.

§ 368. **Same—1. Covenants of Title.** A covenant of title is a stipulation on the part of the lessor, in one form or another, that he is transferring to the lessee a good title to the land leased, and that the lessee shall enjoy quiet and undisturbed possession of the same throughout the tenancy. Such covenants may be express, or implied by the law.

A covenant for the quiet enjoyment of the leased premises in favor of the lessee is implied from the use of words of demise, such as "demise," "let" or "lease."⁹⁰ Indeed, according to the weight of authority, at least in this country, such a covenant may be implied in a lease for years merely from the relation of landlord and tenant, though there be no special words of demise, as in case of a verbal lease.⁹¹

Moreover, there may be implied from proper words of demise (but not from the mere relation of landlord and tenant) a covenant that the lessor has lawful power to make the lease.⁹²

Of course there may also be express covenants of quiet enjoyment and of lawful power to demise, and if their terms are more

⁸⁹ Post, § 466 et seq.

⁹⁰ 2 Min. Insts. 193; McClenahan v. Gwynn, 3 Munf. (Va.) 556; Black v. Gilmore, 9 Leigh (Va.) 448, 33 Am. Dec. 253; Stott v. Rutherford, 92 U. S. 107, 23 L. Ed. 486; Foster v. Peyser, 9 Cush. (Mass.) 242, 57 Am. Dec. 43; Maule v. Ashmead, 20 Pa. 482; Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350.

⁹¹ Rawle, Cov. § 274; Duncklee v. Webber, 151 Mass. 408, 24 N. E. 1082; Mack v. Patchin, 42 N. Y. 167, 1 Am. Rep. 506; Barns v. Wilson, 116 Pa. 303, 9 Atl. 437; Baugher v. Wilkins, 16 Md. 35, 77 Am. Dec. 279; Avery v. Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680. But in Virginia the doctrine seems to be otherwise. Black v. Gilmore, 9 Leigh (Va.) 446, 33 Am. Dec. 253.

⁹² 1 Tiffany, Real Prop. § 43; Rawle, Cov. § 274; Gano v. Vanderveer, 34 N. J. Law, 293; Vernam v. Smith, 15 N. Y. 327.

restricted in scope than the implied covenants would be in their absence, they have the effect of restricting to the same extent the implied covenants themselves.⁹³

Nevertheless, the covenant of quiet enjoyment only protects the lessee against an eviction by the lessor or by a stranger under a paramount title, and does not embrace mere acts of trespass or wrongdoing on the part of either lessor or stranger, nor even an unlawful eviction by a stranger.⁹⁴

§ 369. Same—2. Covenant for Rent. A covenant to pay rent is implied, on the part of the lessee, from the words "yielding and paying" the stipulated rent, and probably from any words designating the amount of rent to be paid, though they be the words of the lessor as in the first instance above given; for by his acceptance of the lease the words constitute an implied engagement or covenant by the lessee to pay the rent at the end of the year or other period for which it is reserved payable, and upon that covenant the lessor may found an action of debt or any other appropriate action for the rent.⁹⁵

Indeed, a promise to pay rent may be implied without the use of any particular words, and without any express lease, though in such case the action is rather in the form of an *indebitatus assumpsit* for use and occupation than of an action to recover rent *eo nomine*. Such an action will lie at common law upon the implied promise arising from the use and occupation of land by permission, or upon an express general promise to pay rent satisfactory to the landlord.⁹⁶

But this implied obligation, resulting as it does from the mere relation of landlord and tenant, continues no longer than the lessee retains the premises, ceasing if he assigns them; whilst an express covenant to pay rent binds the lessee personally, independently of his interest in the land.⁹⁷

⁹³ Rawle, *Cov.* § 275; *Nokes' Case*, 4 Co. 80b; *Kent v. Welch*, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266; *Burr v. Stenton*, 43 N. Y. 462; *O'Connor v. Memphis*, 7 Lea (Tenn.) 219; *Merritt v. Closson*, 36 Vt. 172; *Crouch v. Fowle*, 9 N. H. 219, 32 Am. Dec. 350.

⁹⁴ *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522; *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708; *Surget v. Arighi*, 11 Smedes & M. (Miss.) 87, 49 Am. Dec. 46; *Baughner v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279. For acts constituting eviction by the landlord, see post, § 373.

⁹⁵ 2 Min. Insts. 775; 2 Th. Co. Lit. 252, Butler's note.

⁹⁶ *Sutton v. Mandeville*, 1 Munf. (Va.) 407, 4 Am. Dec. 549. See *Ward v. Ward*, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

⁹⁷ 2 Min. Insts. 775; 1 Washburn, *Real Prop.* 326, 333, 334.

§ 370. **Same—3. Covenant to Repair.** In the absence of express stipulation, the lessee is under no other obligation to repair the premises than is imposed upon him by the general and obvious duty to return the premises at the end of the lease in as good condition as possible, excepting deteriorations resulting from ordinary wear and tear and damage which is the direct consequence of inevitable forces, or acts of God or a public enemy. In other words the law implies no covenant on the part of the lessee to repair, except to the extent necessary to prevent him from being guilty of waste.⁹⁸

With respect to the tenant's express covenants upon this point, a distinction is to be noted at common law between a covenant to repair and a covenant to return the premises in good condition, ordinary wear and tear excepted, or words to that effect—a distinction which, while not universally recognized, is quite generally observed.

A covenant in the latter form is generally looked upon as nothing more than an embodiment in words of the duty resting upon the lessee at common law, and does not make him responsible for destruction of the premises or injury thereto by causes which would not involve the tenant in liability for waste, either voluntary or permissive.⁹⁹

But if the covenant be in the form of a promise to repair, or to return or keep or leave or surrender the premises in good repair, or wherever there are no qualifying words showing some design to limit the lessee's responsibility, it is a well-established principle of the common law that the lessee is thereby obligated to rebuild the destroyed premises at all events, though the destruction be caused by the act of God, such as lightning or flood, and without any fault on the part of the tenant.¹ The rigor with which

⁹⁸ Post, § 379; 2 Min. Insts. 194.

⁹⁹ Maggort v. Hansbarger, 8 Leigh (Va.) 536; Warner v. Hitchins, 5 Barb. (N. Y.) 666; McIntosh v. Lown, 49 Barb. (N. Y.) 550; Armstrong v. Maybee, 17 Wash. 24, 48 Pac. 737, 61 Am. St. Rep. 898; Wainscott v. Silvers, 13 Ind. 500; Howeth v. Anderson, 25 Tex. 557, 78 Am. Dec. 538; Miller v. Morris, 55 Tex. 412, 40 Am. Rep. 814; Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446.

¹ 2 Min. Insts. 923; Walton v. Waterhouse, 3 Saund. 420, 422a, note; Bullock v. Dommitt, 6 T. R. 650; Digby v. Atkinson, 4 Campb. 278, note; Richmond Ice Co. v. Crystal Ice Co., 99 Va. 244, 37 S. E. 851; Phillips v. Stevens, 16 Mass. 238; Beach v. Crain, 2 N. Y. 87, 49 Am. Dec. 369; Hoy v. Holt, 91 Pa. 88, 36 Am. Rep. 659; Polock v. Pioche, 35 Cal. 416, 95 Am. Dec. 115, note; Armstrong v. Maybee, 17 Wash. 24, 48 Pac. 737, 61 Am. St. Rep. 898; McIntosh v. Lown, 49 Barb. (N. Y.) 550; Wainscott v. Silvers, 13 Ind. 500.

this covenant, as well as that for the payment of rent, is enforced at common law, is well illustrated by the Virginia case of *Ross v. Overton*,² where a mill, leased at a given rent for seven years and with a covenant to return in good repair, was swept away by a flood. It was held that the tenant must at common law not only continue to pay the rent throughout the term without abatement, but must also rebuild the mill under his covenant to return in good repair.

In conclusion, it must be observed that the law implies no obligation upon the lessor to repair the leased premises. If such responsibility rests upon him, it must be by virtue of his express agreement.³

§ 371. Same—4. Covenant Not to Assign without Leave. While a tenant at will cannot assign, though he may sublease his estate, the assignment operating as a termination of the estate,⁴ it is otherwise with regard to tenants for life or for years, who are permitted freely to assign or sublet unless restricted by covenants or conditions in the lease, which restrictions, however, may be absolute or qualified.⁵ But such restrictions are not favored by the law and are strictly construed.⁶

It is to be observed that such a covenant, if it appears in the lease, does not invalidate an assignment or sublease made by the tenant, but he is merely liable in damages for the breach of the covenant. But in this as in other cases, if the stipulation be in the form of a condition, or in the form of a covenant with the further stipulation for a right of entry in case of its violation (which makes the covenant equivalent to a condition), an assignment or sublease of the premises is a ground of forfeiture by the tenant, and the landlord may re-enter.⁷

§ 372. Same—5. Covenant That Lessor may Re-enter for Default in Payment of Rent or for Breach of Any Covenant in the Lease. This is a quite usual and a very important covenant to be contained in a lease. Its effect is practically to convert what are covenants in form into conditions, the breach of which permits the lessor to enter and terminate the estate, instead of confining

² 3 Call, 309, 319, 2 Am. Dec. 552.

⁴ Ante, § 337.

³ 2 Min. Insts. 193.

⁵ Ante, §§ 194, 329; post, § 525.

⁶ Post, § 525; 2 Min. Insts. 194; 1 Washburn, Real Prop. 337. A condition or covenant not to assign is therefore not violated by a sublease. *Crusoe v. Bugby*, 2 W. Bl. 766; *Jackson ex dem. Welden v. Harrison*, 17 Johns. (N. Y.) 66; *Hargrave v. King*, 40 N. C. 430.

⁷ *Paul v. Nurse*, 8 B. & Cr. 486; *Williams v. Earle*, L. R. 3 Q. B. 739; *Shattuck v. Lovejoy*, 8 Gray (Mass.) 204; *Burnes v. McCubbin*, 3 Kan. 221, 87 Am. Dec. 468; post, §§ 372, 473.

him to an action for damages for breach of the covenant. It gives him the option to do either—an option he does not have if it be a pure covenant on the one side or a pure condition on the other.

But, in the application of this covenant to re-entry for default in the payment of rent, it is necessary that the lessor before making the re-entry should demand of the tenant that he pay the rent, unless there be a contrary agreement.⁸

§ 373. VII. Landlord's Duty Not to Evict Tenant. Upon the eviction of the tenant, three important consequences follow: (1) The lessee is entitled to sue the landlord upon his covenant of quiet enjoyment; ⁹ (2) the lessee's estate is thereby terminated as to the land so taken, and he ceases to be estopped to deny the landlord's title as to that land; ¹⁰ and (3) there is an abatement of the rent.¹¹ These results follow equally, whether the eviction be by a stranger under paramount title or by the lessor, except only that in the matter of the abatement of the rent, the law seeks to punish the lessor for his wrongful act, and hence suspends the entire rent, though the lessee be evicted by the lessor from a small part of the premises only, while if the eviction be by a stranger under title paramount the rent is merely reduced *pro tanto*.¹²

An eviction of the tenant by the landlord may be either actual, as where the tenant or his sublessee is actually dispossessed of the premises, or part thereof,¹³ or constructive, not involving an actual dispossession, but consisting of some permanent act of the landlord, with the intention, and with the effect, of depriving the tenant of the full enjoyment of the premises, forcing the tenant to leave or abandon the premises.¹⁴ But the landlord's mere entry upon the land and doing acts of trespass there, however aggravated, there being no claim of ownership, does not amount to an eviction, actual or constructive, but only gives the tenant an action for damages.¹⁵

To constitute a constructive eviction, as indicated by the definition thereof above given, four conditions must concur: (1) The landlord's act must be of a permanent character, that is, not a mere

⁸ *Duppa v. Mayo*, 1 Saund. 287, note 16; *Doe v. Wandlass*, 7 T. R. 117.

⁹ *Ante*, § 358.

¹⁰ *Ante*, § 357.

¹¹ *Ante*, § 366.

¹² *Ante*, § 366.

¹³ *Burn v. Phelps*, 1 Stark. 94; *Briggs v. Thompson*, 9 Pa. 338.

¹⁴ 1 *Tiffany*, Real Prop. § 51; *Upton v. Townend*, 17 C. B. 30; *Briggs v. Hall*, 4 Leigh (Va.) 484, 26 Am. Dec. 326; *Tunis v. Grandy*, 22 Grat. (Va.) 130; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124.

¹⁵ 2 *Min. Insts.* 760; *Smith v. Raleigh*, 3 Campb. 513; *Upton v. Townend*, 17 C. B. 30; *Briggs v. Hall*, 4 Leigh (Va.) 484, 26 Am. Dec. 326; *Tunis v. Grandy*, 22 Grat. (Va.) 130; *Skally v. Shute*, 132 Mass. 367; *Lounsbery v. Snyder*, 31 N. Y. 514; *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446.

temporary act of trespass, or producing temporary inconvenience to the tenant;¹⁶ (2) the landlord's act must be done with the intention (implied, if not expressed) to deprive the owner partially at least of the enjoyment of the property leased, this intention, always difficult to establish, being generally for the jury to determine;¹⁷ (3) the act must have the effect designed, that is, must deprive the tenant of the full enjoyment of the premises;¹⁸ and (4) the tenant must, by reason of the landlord's act, have been induced to abandon the premises in whole or in part. He cannot remain in possession of the entire premises, and yet claim that he has been evicted.¹⁹

§ 374. VIII. Assignment and Sublease of the Premises. In the absence of stipulations to the contrary, a tenant may always assign or sublease the premises.²⁰

The difference between an assignment and a sublease is marked, not only in their respective natures, but in their effects also. An assignment is a total transfer to another of all the tenant's interest in the whole or a part of the premises, leaving no interest in the assignor as to the land assigned,²¹ and the assignee steps, as it were, into the shoes of his assignor, succeeding to all his rights and liabilities; in other words, he is a privy in estate of the lessor, and a privy in contract of the lessee (but not of the lessor).²²

A sublease, on the other hand, is a transfer of only part of the lessee's estate in the land leased, or in part thereof, leaving a reversion in the lessee as to the land sublet.²³ The sublessee is not

¹⁶ See *supra*.

¹⁷ *Upton v. Townend*, 17 C. B. 30; *Hunt v. Cope*, Cowp. 242; *Skally v. Shute*, 132 Mass. 367; *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716.

¹⁸ *Upton v. Townend*, 17 C. B. 30; *Skally v. Shute*, 132 Mass. 367; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Sully v. Schmitt*, 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659; *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727; *Ogilvie v. Hull*, 5 Hill (N. Y.) 52; *Coulter v. Norton*, 100 Mich. 38, 59 N. W. 163, 43 Am. St. Rep. 458; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Hoeverler v. Fleming*, 91 Pa. 322; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117; *Edmison v. Lowry*, 3 S. D. 77, 52 N. W. 583, 17 L. R. A. 275, 44 Am. St. Rep. 775.

¹⁹ 1 *Tiffany*, Real Prop. § 51; *Dewitt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58; *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *Edgerton v. Page*, 20 N. Y. 281; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Barrett v. Boddie*, 158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172.

²⁰ Ante, § 371; 1 *Taylor*, Landl. & Ten. § 402.

²¹ Post, § 991 et seq.

²² Post, §§ 376, 991, et seq.; *Walker's Case*, 3 Co. 22a; *Marsh v. Brace*, 2 Cro. (Jac.) 334; *Drake v. Lacoe*, 157 Pa. 17, 38, 27 Atl. 538; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Nova Cesarea Harmony Lodge No. 2 v. White*, 30 Ohio St. 569, 27 Am. Rep. 492. See 7 *Am. Law Rev.* 245.

²³ 1 *Taylor*, Landl. & Ten. § 109; *Stewart v. Long Island R. Co.*, 102 N.

in privity, either of estate or of contract, with the original landlord, and therefore neither can enforce any personal liability against the other, they being in law total strangers to each other.²⁴

The fact that the lessee, in making the transfer to another, reserves a rent greater or less than he himself has stipulated to pay the landlord for the premises, does not prevent the transfer from being treated as an assignment, at least so far as concerns the original landlord, if the interest transferred by the lessee is his whole interest in either the entire land or in part thereof.²⁵ The assignment may take place, not only by voluntary transfer, but also by act of the law, as where the tenant's estate passes to a purchaser at a judicial sale, or to an assignee in bankruptcy or insolvency,²⁶ or to the tenant's personal representative upon his death.²⁷

§ 375. IX. Covenants Running with the Land. Covenants contained in a lease or conveyance of land are said to run with the land "when they are of such character that the benefits and burdens thereof pass with the land to the assignee, into whosoever hands the land may come."²⁸

In order that a covenant may run with the land, and the benefits and burdens pass, two circumstances must concur: (1) The covenant must refer to something which affects the nature, quality or value of the land leased or conveyed; and (2) there must be a privity of estate between the parties concerned.²⁹

Hence, if a lessor leases land to a tenant, stipulating in the lease that the tenant will leave the premises in good repair, or that he shall pay the taxes, or keep the premises insured, or pay the rent,

Y. 601, 8 N. E. 200, 55 Am. Rep. 844; *Krider v. Ramsay*, 79 N. C. 354.

²⁴ Post, § 376.

²⁵ 1 Washburn, Real Prop. 333; 1 Taylor, Landl. & Ten. §§ 16, 426; *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394; *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274; *Field v. Mills*, 33 N. J. Law, 254. But see *Dunlap v. Bullard*, 131 Mass. 161.

²⁶ *McNeil v. Ames*, 120 Mass. 481; *Evans v. Hamrick*, 61 Pa. 19, 100 Am. Dec. 595.

²⁷ 2 Taylor, Landl. & Ten. §§ 460, 461; 2 Bl. Com. 386; *Vyryan v. Arthur*, 1 B. & Cr. 410; *Allender v. Sussan*, 33 Md. 11, 3 Am. Rep. 171; *Keating v. Condon*, 68 Pa. 75; *Inches v. Dickinson*, 2 Allen (Mass.) 71, 79 Am. Dec. 765.

²⁸ 2 Min. Insts. 775. Covenants running with the land are not confined to leases, but are to be found also in conveyances of the fee simple, as in case of covenants of title. Post, § 903.

²⁹ 2 Min. Insts. 716; Rawle, Cov. 281; Bac. Abr. Covenant (E), 3, 4; *Spencer's Case*, 5 Co. 15b, 1 Smith, Lead. Cas. 92, 96, et seq.; *Morse v. Garner*, 1 Strob. (S. C.) 514, 47 Am. Dec. 570, note; *Gibson v. Holden*, 115 Ill. 109, 3 N. E. 282, 56 Am. Rep. 151, note.

or not commit waste, etc., or stipulating that the lessor will repair, or that he has lawful power to demise, or that the tenant shall have quiet possession, all these are covenants which concern or affect the nature, quality or value of the land itself, and if the lessee should subsequently assign all his interest in the premises, or in part of them, to another, the assignee, being in privity of estate with the lessor, the covenants run with the land, so that the assignee must bear the burdens and may enjoy the benefits of the covenants.³⁰

In order that the assignee be thus bound or benefited, it is not necessary, even at common law, that assigns be expressly mentioned in the covenant as beneficiaries or obligors thereof, except in the single instance where the covenant relates to something not in esse, as where the lessee binds himself to the future building of a wall or structure on the premises. In this case, the assignees of the lessee are not bound to build such structures unless assigns be expressly mentioned.³¹

On the other hand, the mere intention of the parties that assigns shall be bound by their covenants, as evidenced by the mention of "assigns" or otherwise, does not cause the covenant to run with the land, if the covenant is not one concerning or affecting the land.³² Thus, where in a lease of land, with liberty to erect a silk mill, the lessee covenanted for himself, his executors and assigns, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate, and afterwards assigned the lease, it was held that the covenant was not one that ran with the

³⁰ 2 Min. Insts. 775, 776; *Spencer's Case*, 5 Co. 15b, 1 Smith, Lead. Cas. 92, 96, et seq.; *Hunt v. Thompson*, 2 Allen (Mass.) 341; *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; *State v. Martin*, 14 Lea (Tenn.) 92, 52 Am. Rep. 167; *Northern Trust Co. v. Snyder*, 46 U. S. App. 179, 76 Fed. 34, 22 C. C. A. 47; *Id.*, 46 U. S. App. 587, 77 Fed. 818, 23 C. C. A. 480; *Thomas v. Vonkapff*, 6 Gill & J. (Md.) 372; *Vyvyan v. Arthur*, 1 B. & Cr. 410. But a covenant in a lease or conveyance of land to pay a certain sum of money to a stranger is not a covenant concerning or affecting the land, and therefore does not run with the land. *Mayho v. Buckhurst, Cro. (Jac.)* 438; *Dolph v. White*, 12 N. Y. 296. Nor is a covenant not to maintain a competing business within a certain distance of the premises. *Thomas v. Hayward*, L. R. 4 Exch. 311.

³¹ 2 Min. Insts. 775, 776; 1 Washburn, Real Prop. 332; *Spencer's Case*, 5 Co. 15b, 1 Smith, Lead. Cas. 92, 96, et seq.; *Congleton v. Pattison*, 10 East, 138; *Grey v. Cuthbertson*, 2 Chit. 482; *Thompson v. Rose*, 8 Cow. (N. Y.) 266; *Tallman v. Coffin*, 4 N. Y. 134; *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282; *Emerson v. Simpson*, 43 N. H. 475, 80 Am. Dec. 184, 82 Am. Dec. 168. See *Sims*, Cov. 108.

³² 2 Min. Insts. 715; *Spencer's Case*, 5 Co. 16, 1 Smith, Lead. Cas. 92 et seq.; *Congleton v. Pattison*, 10 East, 130; *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247; *Masury v. Southworth*, 9 Ohio St. 340; *Gibson v. Holden*, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146.

land, affecting neither its nature, quality nor value, and that the assignee was not bound thereby.³³ And so a covenant to pay certain sums annually for the use of the poor does not run with the land;³⁴ nor a covenant to build a house on land other than that demised, or to pay a collateral sum to a stranger; nor a covenant to return the cattle, or cattle of like value, leased with the premises.³⁵ Such covenants are collateral to the land, and do not run therewith. They are beneficial or burdensome to the tenant without regard to his continued occupancy of the land leased, and his assignees are not benefited nor bound thereby, though they be expressly named.³⁶

§ 376. **Same—Privity of Estate Necessary to Covenants Running with the Land.** Though a covenant concerns or affects the nature, quality or value of the land leased or conveyed, it does not run therewith, except in the hands of persons in privity of estate with the original lessor or grantor.³⁷ Hence, where land is granted to W. with power of appointment, and with a covenant by W. and his assigns to pay rent, and W. appoints to J., who covenants to pay the same rent, J. or his representative cannot be sued by the original grantor upon W.'s covenant to pay rent, because J. does not hold under W., but under the original grantor.³⁸

So, also, while the assignees of a lease are in privity of estate with the original lessor, it is otherwise with the tenant's sublessee, who, not succeeding to the entire interest of the lessee in the whole or in part of the premises, does not stand in his shoes, and is neither in privity of estate nor of contract with the original lessor.³⁹

§ 377. **Same—Duration of Benefits and Burdens of Covenants.** So far as the original parties to a covenant (the lessor and lessee) are concerned, they are in privity of contract with each other, and

³³ Congleton v. Pattison, 10 East, 130.

³⁴ Mayho v. Buckhurst, Cro. (Jac.) 438; 2 Min. Insts. 715.

³⁵ 2 Min. Insts. 715; Spencer's Case, 5 Co. 16b, 1 Smith, Lead. Cas. 92, 96, et seq.; Bac. Abr. Covenant (E), 3; Rawle, Cov. 281 et seq.

³⁶ 2 Min. Insts. 775; 1 Washburn, Real Prop. 331; Vyvyan v. Arthur, 1 B. & Cr. 410; Vernon v. Smith, 5 B. & Ald. 11.

³⁷ 2 Min. Insts. 715, 716; Bac. Abr. Covenant (E), 3; Roach v. Wadham, 6 East, 289.

³⁸ Roach v. Wadham, 6 East, 289.

³⁹ Ante, § 374; 2 Min. Insts. 799; Sims, Cov. 99; Stewart v. Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Mayhew v. Hardesty, 8 Md. 479. But the lessor cannot be deprived, without his consent, of any right of entry upon the entire premises for breach of condition or covenant by the sole act of the tenant in subleasing. Ante, § 366; Arnsby v. Woodward, 6 B. & Cr. 519; Wheeler v. Earle, 5 Cush. (Mass.) 31, 51 Am. Dec. 41; Peck v. Ingersoll, 7 N. Y. 528.

the benefits or burdens of their contract attach to them personally, regardless of their continued ownership or occupancy of the reversion or the land, respectively.⁴⁰ In case, however, of the lessee's assignment of the premises, while the lessee continues liable to the lessor upon his personal covenant, he is regarded as liable as a surety only; the primary liability resting upon the assignee of the premises, if the covenant be one that runs with the land.⁴¹

But the assignee's responsibility or rights upon covenants running with the land are based, not upon privity of contract with the original lessor, but upon privity of estate, and accrue only by virtue of his ownership or occupancy of the premises. They therefore endure so long as the assignee continues to occupy the premises, and cease the moment he assigns them, though it be to a beggar, or though he assign the premises with the express design to relieve himself of his responsibilities.⁴² But this does not mean that an assignee, after having himself violated a covenant running with the land, may escape responsibility therefor by assigning the premises to another. He is liable for, or may take advantage of, all breaches occurring in his time, whether or not his interest in the premises continues.⁴³ But he is never liable for a breach of covenants, whether express or implied, occurring before the assignment to him nor after he assigns to another; nor, on the other hand, can he sue the lessor for such breaches of the covenants by him.⁴⁴ Hence, if a lessee covenants to rebuild a house on the leased premises within a time limited, and fails to do so, and then assigns his lease, the assignee is not chargeable; the covenant not having been broken by him.⁴⁵

It follows from what has been said that a covenant already broken ceases at once to pass with the land, because the breach must occur during the occupancy of the assignee, in order that he may be liable for or take advantage of it. When broken, the covenant ceases to

⁴⁰ 2 Min. Insts. 716.

⁴¹ *Moule v. Garrett*, L. R. 7 Exch. 101; *Humble v. Langston*, 7 M. & W. 517; *Farrington v. Kimball*, 126 Mass. 313, 30 Am. Rep. 680; *Bender v. George*, 92 Pa. 36; *Brinkley v. Hambleton*, 67 Md. 169, 8 Atl. 904.

⁴² 2 Min. Insts. 716; *Valliant v. Dodemede*, 2 Atk. 546; *Bell v. American Protective League*, 163 Mass. 558, 40 N. E. 857, 28 L. R. A. 452, 47 Am. St. Rep. 481; *Sanders v. Partridge*, 108 Mass. 556; *Washington Natural Gas Co. v. Johnson*, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553; *Hintze v. Thomas*, 7 Md. 346; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481.

⁴³ 2 Min. Insts. 716, 798, 799.

⁴⁴ 2 Min. Insts. 799; *Rawle, Cov.* 285 et seq.; *Farmers' Bank v. Mutual Assur. Soc.*, 4 Leigh (Va.) 69; *Dickinson v. Hoomes*, 8 Grat. (Va.) 353, 395, 396.

⁴⁵ 2 Min. Insts. 799.

run with the land, and becomes a mere chose in action in the hands of him who had the land or the reversion at the time of the breach.

§ 378. **X. Covenants Running with the Reversion.** While it seems always to have been admitted at common law, upon an assignment of the land, that the benefits and burdens of covenants in the lease pass with the land to the assignee thereof, it is equally an accepted doctrine of the common law that, upon an assignment of the reversion by the lessor, the assignee of the reversion can neither maintain actions on the express covenants against the lessee, nor is he liable to be sued by the lessee or his assignee upon the lessor's express covenants. Such express covenants are at common law said to run with the land, but not with the reversion.⁴⁶

With covenants in law, or implied covenants, it is otherwise. They pass even at common law with the reversion, so that the assignee of the reversion may sue the tenant for the rent reserved, a promise to pay which is implied from such phrases as "yielding and paying" or "reserving" the stipulated rent.⁴⁷

But when Henry VIII abolished the monasteries in England, and, confiscating their lands (which for the most part were leased out upon long terms), transferred the reversions in them to his favorites, it was found that under this doctrine of the common law these royal and noble assignees could not enforce the express covenants in the leases, and the value of their reversions was thus seriously impaired. The king thereupon prevailed upon Parliament to enact the statutes 31 Hen. VIII, c. 13, and 32 Hen. VIII, c. 34, the primary purpose of which was to permit the assignees of the reversion to enforce covenants, though Parliament was induced to make the right mutual, and to allow the assignee of the reversion to be sued as well as to sue upon the express covenants contained in the lease, provided the covenant be of such a character that, if the land were assigned, the covenant would run with the land.⁴⁸

It is apparent from the tenor of the statute that it extends only to leases for life or years, and not to conveyances of the fee simple, and it is held to apply to assignees where a reversion in part of the land is assigned, as well as where a part of the reversionary estate is carved out of the reversion and assigned.⁴⁹

⁴⁶ 2 Min. Insts. 799; *Thursby v. Plant*, 1 Saund. 240.

⁴⁷ Ante, § 369; 2 Min. Insts. 799, 800; *Vyvyan v. Arthur*, 1 B. & Cr. 410. For other implied covenants on the part of lessee and lessor, respectively, see ante, §§ 414, 415.

⁴⁸ 2 Min. Insts. 800; 2 Th. Co. Lit. 89 et seq., note (M, 2).

⁴⁹ 2 Min. Insts. 800; *Sims, Cov.* 98, 99; *Congham v. King*, Cro. Car. 221; *Twynam v. Pickard*, 2 B. & Ald. 105; *Wright v. Burroughes*, 3 C. B. 685; *Harris v. Frank*, 52 Miss. 155; *Leiter v. Pike*, 127 Ill. 287, 20 N. E. 23.

It is to be observed that the lessor remains liable personally on his covenants, even though he assigns the reversion (though the assignee also becomes liable), since, as in case of an assignment by the lessee, the privity of contract continues.⁵⁰

It is immaterial whether the assignment of the reversion be voluntary or by operation of law,⁵¹ but it is essential that the assignee should have come in of the same estate in respect of which the covenant was made. Hence, if he comes in by title paramount, the statute does not apply. Thus, if a lessee for twenty years leases for ten, and afterwards surrenders to him in reversion, the reversioner, being in by the elder title, which merges the one surrendered, cannot have the benefit of a condition or covenant entered into by the under lessee.⁵²

⁵⁰ *Grey v. Cuthbertson*, 2 Chit. 482; *Jones v. Parker*, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485. But it is said that the lessor cannot sue for a breach of a covenant running with the land which occurs after his assignment of the reversion. *Stoddard v. Emery*, 128 Pa. 436, 18 Atl. 339. See *Green v. James*, 6 M. & W. 656; *Vernon v. Smith*, 5 B. & Ald. 11.

⁵¹ *Burton v. Smith*, 13 Pet. 464, 10 L. Ed. 248; *Woodgate v. Fleet*, 44 N. Y. 1; *Evans v. Hamrick*, 61 Pa. 19, 100 Am. Dec. 596; *Murrell v. Roberts*, 33 N. C. 424, 53 Am. Dec. 419; *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364.

⁵² 2 Min. Insts. 801.

CHAPTER XIX.

WASTE.

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§ 379. **Definition and General Nature of Waste.** Waste is any permanent injury to the inheritance, arising otherwise than by an act of God or of a public enemy, or (perhaps) by an act for which no one is in any manner responsible (such as an accidental fire.)¹

The last clause of this definition is doubtful at common law, it being said by Lord Coke that the burning of a house by mischance is waste,² and Lord Hardwicke lays down the general proposition that the destruction of a house by fire is waste, and the tenant must rebuild.³

¹ See 2 Min. Insts. 112; Co. Lit. 53a; 4 Kent, Com. 82; White v. Wagner, 4 Har. & J. (Md.) 373, 7 Am. Dec. 674; Pyncheon v. Stearns, 11 Metc. (Mass.) 304, 45 Am. Dec. 207; McGregor v. Brown, 10 N. Y. 114; King v. Miller, 99 N. C. 583, 6 S. E. 660. In the language of Blackstone, waste is a spoil or destruction, not arising from an act of God or of a public enemy, in houses, gardens, trees, lands, or other corporeal hereditaments, to the disherison of him who has the immediate remainder or reversion in fee simple or fee tail. The general heads of waste are in houses, in timber, in minerals and in land, although whatever else tends to the destruction or to the depreciation of the value of the inheritance is likewise waste. 2 Bl. Com. 281, 282; 3 Th. Co. Lit. 233 et seq. For the scope of the phrase "act of God," see notes to 26 L. R. A. 103; 95 Am. Dec. 121.

² Co. Litt. 53a.

³ ———, 1 Ves. 462.

But, if this was the rule of the common law, it was changed in England, as to destruction by fire not arising from the negligence of the tenant or his servants, by the statute 6 Anne, c. 31. And in this country the rule, even in the absence of such statutes, seems to be that destruction by accidental fire, at least, does not constitute waste, if, indeed, this exemption does not extend to any destruction not caused by the tenant's voluntary or negligent act, or that of his servants.⁴

It should be observed that while destruction occasioned, without fault of the tenant, directly by an act of God, as by tempest, lightning, flood, and the like, or by act of a public enemy, or (according to the American view above enunciated) by pure accident, is not waste, yet if further damage ensue from the tenant's failure promptly to repair, temporarily at least, such injury, as by replacing temporarily a roof taken off by tempest, such further damage is waste.⁵ But there is no obligation upon the tenant to make general repairs or to restore the premises to the substantial condition in which they were when they received the injury. They must simply be made by the tenant wind and water tight as soon as possible, so that they shall receive no additional damage from the weather, etc.⁶

And even though the injury be the direct result of an act of God, yet if the act of God would not have caused such injury except for the previous neglect of the tenant, it is still waste. Thus, if a tenant allows leased premises to remain unrepaired so long as to weaken them, so that the building is easily blown down by a storm it ought to have withstood if in proper condition, it is waste. And so if retaining walls, intended to keep out the inroads of water, are overthrown by a sudden flood, it is still waste if the destruction be the result of the tenant's neglect to repair or duly to secure them.⁷

§ 380. Several Kinds of Waste. Waste may be classified into legal waste, or waste recognized in a court of law, and equitable waste, recognized in a court of equity only. Legal waste is divided into voluntary and permissive.

Voluntary waste is the result of the tenant's acts of commission, as the unauthorized destruction of houses or cutting down of trees or digging of minerals; while permissive waste results from acts

⁴ 4 Kent, Com. 82; *United States v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65. But see post, § 386, and 2 Min. Insts. 615, as to destruction caused by a stranger, or by any cause, not an act of God or of a public enemy.

⁵ 2 Min. Insts. 601, 614; ante, § 356.

⁶ 2 Min. Insts. 601; 2 Bl. Com. 281; 3 Th. Co. Lit. 235, 236, note (E); Bac. Abr. Waste (C) and (E).

⁷ 2 Min. Insts. 602; 3 Th. Co. Lit. 236, note (F); Bac. Abr. Waste (E).

of omission or the negligence of the tenant, as by suffering a house to fall by the neglect of necessary repairs, or by the negligent breaking of doors, windows, etc., or, possibly, from the deliberate or negligent act of strangers or from pure accident.⁸

We shall therefore consider: (1) Voluntary waste; (2) permissive waste; and (3) equitable waste.

§ 381. **I. Voluntary Waste—1. Destruction or Altering of Houses.** To pull down a house and rebuild it less than before is certainly waste; and it seems at common law to be no less waste to rebuild it greater than before, because, it is said, it is to the prejudice of the owner of the inheritance, for it is more charge to repair! A better reason is that the consequent alteration in the description of the premises might impair the evidence of the owner's title. Indeed, Lord Coke holds it to be waste even to build a new house where there was none before.⁹ But in England, at least, this seems to be no longer the rule if the value of the land has been increased by the rebuilding—a doctrine much more conformable to modern ideas of justice and reason.¹⁰

Burning a house, whether by negligence or mischance, seems also in England to have been at common law regarded as waste. But by statute 6 Anne, c. 31, no action is to be prosecuted against any person in whose house or chamber any fire accidentally begins. In this country, however, it is believed that this would not be regarded as waste, even in the absence of a statute corresponding to 6 Anne, c. 31.¹¹

So, at common law, any alteration in a house is waste, whether for the better or the worse. Thus it is waste to tear down a wall between two rooms, or to convert a hall or a parlor into a stable, or to pull down an attic overhead, or to remove a door or window. And so it was formerly waste to convert a house of one description into a different one, though it be of more value, because, it is said, the alteration in the nature of the thing may make it less fit for the owner's purpose, and at all events may impair the evidence of the identity of the property.¹² It is probable, however, in mod-

⁸ 2 Min. Insts. 601.

⁹ 2 Min. Insts. 602; 3 Th. Co. Lit. 233, note (A), 235, note (C); *Smyth v. Carter*, 18 Beav. 78; *Cole v. Green*, 1 Lev. 309; *City of London v. Greyme*, Cro. (Jac.) 181; *Young v. Spencer*, 10 B. & Cr. 145; *Davenport v. Magoon*, 13 Or. 3, 4 Pac. 299, 57 Am. Rep. 1; *Dooley v. Stringham*, 4 Utah, 107, 7 Pac. 405.

¹⁰ *Doherty v. Allman*, 3 App. Cas. 709; *Brooke v. Mernagh*, L. R. 13 Ir. 86.

¹¹ Ante, § 379; 4 Kent, Com. 82; *United States v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65. But see 2 Min. Insts. 615.

¹² 2 Min. Insts. 603; 3 Th. Co. Lit. 235, note (C); *Bac. Abr. Waste* (C) 5, 6; *Cole v. Green*, 1 Lev. 309.

ern times that the rule would be otherwise, if the alteration results in increasing the value of the property. Indeed, it has been so held in England.¹³

§ 382. **Same—2. Cutting Timber.** Timber trees, and fruit trees also, are parcel of the inheritance.¹⁴ The particular tenant, in the absence of contract, is only entitled to the mast or fruit of them, and to the benefit of the shade, but the general ownership remains in the owner of the inheritance. Hence, though severed, they still belong to the owner of the inheritance, whether severed by accident or by wrongful act, and if cut down by the tenant, he is guilty of waste.¹⁵

But this proposition must be taken in subordination to several other important principles; as,

(1) To the great principle that in those regions of country where forests are extensive and cleared land is worth more than it is with the timber and wood growing upon it, so that cutting the timber, instead of injuring the inheritance permanently, rather enhances its value, the cutting of the timber, even for purposes of sale, is not waste.¹⁶

(2) To the right of a tenant to cut wood by way of estovers or botes for house-bote, fire-bote, cart-bote and hedge-bote, unless restrained (which is quite usual) by particular covenants or exceptions in the lease.¹⁷ But this gives the tenant no right to sell the timber, though the proceeds be applied to repairs;¹⁸ and he should not cut growing timber, so long as he has dead or inferior wood at his disposal that would answer his purpose.¹⁹

(3) To the right which the tenant has at any reasonable time he pleases to cut down underwood for the purpose of thinning the

¹³ *Doherty v. Allman*, 3 App. Cas. 709; *Brooke v. Mernagh*, L. R. 23 Ir. 86.

¹⁴ As to ornamental and shade trees, they are protected in equity, and it is equitable waste to cut them down, but it is not legal waste. Post, § 387.

¹⁵ Ante, § 40; 2 Min. Insts. 603.

¹⁶ 2 Min. Insts. 603; *Mooers v. Wait*, 3 Wend. (N. Y.) 104, 20 Am. Dec. 667; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *Sayers v. Hoskinson*, 110 Pa. 473, 1 Atl. 308; *King v. Miller*, 99 N. C. 583, 6 S. E. 660; *Davis v. Gilliam*, 40 N. C. 308; *Cannon v. Barry*, 59 Miss. 289; *Johnson v. Johnson*, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72; *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368. See *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733; *Macaulay v. Dismal Swamp Land Co.*, 2 Rob. (Va.) 507.

¹⁷ Ante, § 39.

¹⁸ 2 Min. Insts. 603; 3 Th. Co. Lit. 239; *Lee v. Alston*, 1 Ves. Jr. 78; *Gower v. Eyre*, Cowp. 160; *Padelford v. Padelford*, 7 Pick. (Mass.) 152; *Gardner v. Dering*, 1 Paige (N. Y.) 573; *Calvert v. Rice*, 91 Ky. 533, 16 S. W. 351, 34 Am. St. Rep. 240; *Walters v. Hutchins*, 29 Ind. 136.

¹⁹ *Doe v. Wilson*, 11 East, 56; *Padelford v. Padelford*, 7 Pick. (Mass.) 152; *Johnson v. Johnson*, 18 N. H. 594.

growth or otherwise, provided he does not destroy the stubs from which it grows nor injure the young timber and subsequent growth.²⁰

§ 383. **Same—3. Changing the Course of Husbandry.** To convert land from one species to another, as arable into meadow, or meadow into pasture, or either into wood, or e converso, etc., these are all acts of waste; not only because it changes the course of husbandry contrary, perhaps, to the designs and plans of the owner of the inheritance, but because also it affects the evidence as touching the identity of the estate, although this latter reason would be generally of little weight in the United States, where lands are commonly described by metes and bounds, and seldom by the character which they happen to have at the time, as arable, pasture, etc. But if lands be sometimes meadow, and then pasture, and then arable, the conversion of it from one to another is admitted not to be waste in England; and hence it may be concluded that it is never waste thus to change the character of the land, according to the course of approved husbandry.²¹

§ 384. **Same—4. Taking of Earth, Stone, Minerals, etc., by Tenant.** A particular tenant for life, for years or at will has in general no right to take clay, gravel, sand, soil, and the like from the leased premises, unless it was one of the recognized modes of making profit from the land before the commencement of the tenancy,²² or unless it be in the nature of estovers for the repair or improvement of the leased premises.²³

To open the land, hitherto unopened, and take away its mineral contents, such as metal, coal, marble or other rock, or oil or gas or other substance of the land, is waste, for it is a detriment to the inheritance; but if the mines, pits or quarries were open before, it is not waste for the tenant to continue the working of them for his own benefit, it being regarded as a taking of the regular profits of the land.²⁴

²⁰ 2 Min. Insts. 603, 604; 2 Bl. Com. 281; Phillips v. Smith, 14 M. & W. 589.

²¹ 2 Min. Insts. 604; 2 Bl. Com. 282; Bac. Abr. Waste (C), 1. The rights of an agricultural tenant with respect to manure made upon the premises has been already quite fully considered. Ante, § 31.

²² United States v. Bostwick, 94 U. S. 53, 24 L. Ed. 65; University v. Tucker, 31 W. Va. 621, 8 S. E. 410; Coates v. Cheever, 1 Cow. (N. Y.) 460; Reed v. Reed, 16 N. J. Eq. 248; Smith v. City of Rome, 19 Ga. 89, 63 Am. Dec. 298. See ante, § 266.

²³ 2 Min. Insts. 606; Co. Lit. 53b; Bac. Abr. Waste (C), 3.

²⁴ 2 Min. Insts. 605; Co. Lit. 54b; Findlay v. Smith, 6 Munf. (Va.) 134, 8 Am. Dec. 733; Koen v. Bartlett, 41 W. Va. 559, 23 S. E. 664, 56 Am. St. Rep. 884, 31 L. R. A. 128; Sayers v. Hoskinson, 110 Pa. 473, 1 Atl. 308; Lynn's Appeal, 31 Pa. 44, 72 Am. Dec. 721; Gaines v. Green Pond Iron Min. Co., 33 N. J.

But if before the commencement of the tenancy the mine or quarry was worked solely for the benefit of the premises, as to secure materials for the repair of buildings thereon, and not for general purposes, as for sale, the tenant, it seems, is restricted to the same or similar uses.²⁵

Whether the discontinuance of work in a mine or quarry, prior to the commencement of the lease, prevents the tenant from working it, depends upon whether the discontinuance is such as to show an apparent intention on the part of the previous owner to devote the land to other uses and to abandon the mine or quarry finally. If so, the tenant must not work it, though he may do so if the discontinuance were merely from want of capital, the lack of a market for the output, etc.²⁶

It is considered the same mine or quarry where it consists of the same stratum or vein of mineral deposit or a vein or stratum underneath the same, and capable of being reached by sinking the original shaft to a greater depth. But if the vein is the same, the tenant is not obliged to confine himself to the original shaft. He may sink new ones at pleasure, within the limits of the land, but so only as to reach the same mine, not a new one.²⁷

It is worth while to observe that when one makes a lease for life or years of land containing minerals, without mention of mines in the lease, the lessee may dig and take the profits of such mines only as were open at the time of the making of the lease. And if the owner lease the land, "together with the mines therein," and there are on the land some mines then open, this shall extend to the open mines alone, and not to any as yet unwrought. But if at the making of the lease there be no open mines on the land, and the lease is made of the lands, "together with all mines therein," the lessee may open new mines, for otherwise the mention of the mines would be of no effect.²⁸

Eq. 603; *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686.

²⁵ *Elias v. Snowdon Slate Quarries Co.*, 4 App. Cas. 454; *Ward v. Carp River Iron Co.*, 47 Mich. 65, 10 N. W. 109. But see *Neel v. Neel*, 19 Pa. 323.

²⁶ *Bagot v. Bagot*, 32 Beav. 509; *Stoughton v. Leigh*, 1 Taunt. 402; *Gaines v. Green Pond Iron Min. Co.*, 32 N. J. Eq. 86.

²⁷ 2 Min. Insts. 605; 3 Th. Co. Lit. 237, note (H); *Bac. Abr. Waste (C)*, 8; *Whitefield v. Dewit*, 2 P. Wms. 242; *Clavering v. Clavering*, 2 P. Wms. 388; *Stoughton v. Leigh*, 1 Taunt. 402; *Elias v. Snowdon Slate Quarries Co.*, 4 App. Cas. 466; *Crouch v. Puryear*, 1 Rand. (Va.) 258, 10 Am. Dec. 528; *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733; *Billings v. Taylor*, 10 Pick. (Mass.) 460, 20 Am. Dec. 533; *Irwin v. Covode*, 24 Pa. 162; *Gaines v. Green Pond Iron Min. Co.*, 33 N. J. Eq. 603.

²⁸ 2 Min. Insts. 605; 3 Th. Co. Lit. 237; *Bac. Abr. Waste (C)*, 3; *Saunders'*

§ 385. **Same—5. Removal of Fixtures, or Injuries Thereto.** The principles determining whether particular chattels affixed to the freehold are to be regarded as real or personal fixtures, and regulating the right of the tenant to remove them and deal with them as his own, have been heretofore noted at length.²⁹

Suffice it to say here that unless the fixture comes within one of the classes which the tenant is permitted to carry away upon the termination of his estate, it ceases to be his property when he annexes it to the land, and he is liable as for waste upon his injury or removal of it.

§ 386. **II. Permissive Waste.** Permissive, sometimes called negligent, waste is generally defined as matter of omission, such as suffering a house to fall or deteriorate for want of necessary repairs.³⁰

It would seem, however, to be somewhat more comprehensive than this language would imply. Thus it would certainly embrace negligent acts of destruction (unless indeed, such acts are regarded as acts of commission and the resulting waste as voluntary waste). And it has been held to be waste on the part of the tenant if the destruction be done by a mob.³¹ If this be correct, it would seem that it must also be waste if the injury be done by a single stranger;³² and there is an excellent reason for this, in that the stranger in injuring the premises is guilty of a trespass, for which, being a wrong to the possession, an action lies only by the tenant in possession, and the owner of the inheritance would be left remediless for the injury to the inheritance, unless he be allowed to hold the tenant responsible, leaving the latter to his action against the wrongdoer.³³

§ 387. **III. Equitable Waste—1. Destruction of Ornamental and Shade Trees.** There are some acts and omissions really very damaging to property, of which yet the common law, originating amongst an uncultured and unrefined people, takes no notice; e. g.,

Case, 3 Co. 12; *Astry v. Ballard*, 2 Lev. 185; *Lord Ross v. Whitman*, 14 M. & W. 870. See ante, § —.

²⁹Ante, § 22 et seq.

³⁰2 Min. Insts. 614; 2 Bl. Com. 218; *Anworth v. Johnson*, 5 Car. & P. 239; *Suydam v. Jackson*, 54 N. Y. 450; *Townshend v. Moore*, 33 N. J. Law, 284.

³¹*White v. Wagner*, 4 Har. & J. (Md.) 373, 7 Am. Dec. 674; 2 Min. Insts. 615.

³²2 Min. Insts. 615; *Fay v. Brewer*, 3 Pick. (Mass.) 203; *Austin v. Hudson River R. Co.*, 25 N. Y. 334; *Powell v. Dayton, S. & G. R. R. Co.*, 16 Or. 33, 16 Pac. 863, 8 Am. St. Rep. 251.

³³But in America, at least, it is believed that it is not waste if the destruction occurs from pure accident for which no one can be held responsible, as in case of fire spreading from house to house, etc. Ante, § 379.

the destruction of ornamental, shelter and shade trees, etc. In the progressive refinement of society this was felt to be an increasing grievance, and at length the Court of Chancery, with very doubtful propriety (the proper recourse being to the Legislature to change the law), undertook in such cases to afford relief, thus giving rise to one instance of what has come to be known as equitable waste, being cognizable nowhere else but in equity.³⁴

It is certainly a just cause of reproach to the common-law courts that after those appendages of ornamental and sheltering trees, etc., had come to be recognized as adding materially to the annual and to the fee-simple value of tenements occupied as residences, those courts should still subornly have refused to admit that the destruction of such things, although it was so detrimental to the inheritance, constituted waste, thereby obliging landlords to go for protection into courts of equity. Thus, in *Packington v. Packington*,³⁵ Lord Hardwicke restrained a tenant for life without impeachment of waste from cutting down ornamental trees. And this precedent has since been followed in a number of cases, limiting the interposition of equity at length to such trees or shrubs as are planted or growing for ornament or for shade and shelter.³⁶

§ 388. **Same—2. Malicious Waste by Tenant without Impeachment of Waste.** Another instance of equitable interposition, which is classed as equitable waste, is where a tenant without impeachment of waste is guilty of making an unconscientious use of his power by willful, malicious, extravagant or “humorous” destruction of the premises.³⁷

This principle seems to have been first declared and acted on by Lord Nottingham in *Abrahall v. Bubb*,³⁸ but it was later applied by Lord Cowper in the much more famous case of *Vane v. Lord Barnard*,³⁹ so that that case is often referred to, erroneously, as having established the doctrine. Lord Barnard was tenant for life

³⁴ 2 Min. Insts. 602; 2 Story, Eq. Jur. § 915; Bac. Abr. Waste (N); *Downshire v. Sandys*, 6 Ves. 107; *Burgess v. Lamb*, 16 Ves. 185; *Harris v. Thomas*, 1 Hen. & M. (Va.) 18; *Kane v. Vandemburgh*, 1 Johns. Ch. (N. Y.) 12.

³⁵ 3 Atk. 215, 216; 2 Min. Insts. 605.

³⁶ *Chamberlayne v. Dummer*, 1 Bro. Ch. 166; *Downshire v. Sandys*, 6 Ves. 106; *Tamworth v. Ferrers*, 6 Ves. 419; *Williams v. McNamara*, 8 Ves. 70; *Burgess v. Lamb*, 16 Ves. 185; 2 Min. Insts. 605. But see *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205; *Duncombe v. Felt*, 81 Mich. 332, 45 N. W. 1004.

³⁷ 2 Min. Insts. 616.

³⁸ 2 Swanst. 172, Freem. 53.

³⁹ 2 Vern. 738. See *Chamberlayne v. Dummer*, 3 Bro. Ch. 565, note (a); *Downshire v. Sandys*, 6 Ves. 110; *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205; *Clement v. Wheeler*, 25 N. H. 361; Bac. Abr. Waste (N); 2 Story, Eq. Jur. § 915; 2 Min. Insts. 617.

of Raby Castle, without impeachment of waste, remainder to his son, against whom, having conceived some displeasure, he got two hundred workmen together, and of a sudden, in a few days, stripped the castle of the lead, iron, glass doors and boards, etc., to the value of £3,000. Lord Chancellor Cowper granted an injunction to stay further waste, and decreed Lord Barnard to repair the injury he had done to the castle, under the direction of one of the masters.

§ 389. **Same—3. Protection of Equitable Owners.** A third instance of equitable waste is where the party aggrieved has equitable rights only; and, indeed, it has been said that the courts of equity will grant an injunction to stop waste more strongly where there is a trust estate. Thus, for instance, in case of a mortgage, or other lien, express or implied, if the party in possession, whether mortgagor or mortgagee, commits waste, or threatens to commit it, an injunction will be granted, although (indeed, because) there is no remedy at law.⁴⁰

§ 390. **The Tenants Punishable for Waste—I. At Common Law.** A very brief reflection will show that an absolute tenant in fee simple, with no incumbrance or charge on the premises, cannot usually be punishable, or in any wise accountable, for waste, how great soever the destruction his indiscretion or caprice may prompt him to commit. His heir, to be sure, may be the sufferer, with a marred inheritance, but *nemo est hæres viventis*; and besides, he has it in his power, by alienation in his lifetime, or by devise, to disappoint the expectations of his next of kin, who would otherwise have been his heirs, so that they have no fixed interest in the inheritance until it actually descends upon them. Whilst, therefore, waste of the premises may be as to them undoubtedly *damnum*, it is *damnum absque injuria*.⁴¹

Tenant in tail, and indeed every tenant of the inheritance, is likewise privileged to commit what waste he pleases, by virtue of his ownership of the inheritance; for since waste is a destruction or permanent injury of the inheritance, how can the owner of the inheritance be accountable or punishable therefor? Always supposing that there is no charge or incumbrance thereon; for, if there be such charge or incumbrance, the person entitled thereto has his security thereby lessened and impaired, and may reasonably complain of waste, and will in equity be protected against it.⁴²

⁴⁰ 2 Min. Insts. 617; 2 Story, Eq. Jur. § 914; *Clarke v. Curtis*, 11 Leigh (Va.) 559, 37 Am. Dec. 625.

⁴¹ 2 Min. Insts. 617; 3 Bl. Com. 224.

⁴² 2 Min. Insts. 617; 2 Bl. Com. 115; *Clarke v. Curtis*, 11 Leigh (Va.) 559, 37 Am. Dec. 625.

No tenant, therefore, is accountable for waste, except one who has an estate not of inheritance; and at common law those tenants only of estates not of inheritance are so punishable who come to their several estates by act of the law—that is, tenants by the curtesy, tenants in dower, and guardians in chivalry. Those tenants of particular estates who come in by the act of the parties are at common law liable not otherwise than upon their covenants; and if the landlord make no provision, by express agreement, against waste, he is in those cases (independently of statute) without remedy, and is left to suffer the consequences of his neglect.⁴³

§ 391. **Same—II. Tenants Punishable in England by Statute.** In favor of the owner of the inheritance, it was provided by the statute of Marlebridge (52 Hen. III, c. 23, A. D. 1268) that a man from henceforth shall have a writ of waste against him that holds by the law of England (that is, by curtesy), or otherwise for term of life, or for term of years, or a woman in dower. So that for more than six hundred years past in England all tenants for life or for years have been punishable for waste, both permissive and voluntary, unless their leases were made, as sometimes they are, without impeachment of waste (*absque impetitione vasti*); that is, that no man shall sue the tenant (*impetere*) for waste committed or suffered. But tenant in tail after possibility of issue extinct is not impeachable for waste, because his estate, at its creation, was an estate of inheritance, and so not within the statute. It is not to be understood, however, when one is without impeachment of waste, that he is at liberty to commit in the premises what destruction soever it may please him. The original doctrine, indeed, was that the privilege merely exempted the tenant from the penalties of the statute of Gloucester, 6 Edward I, c. 5 (*viz.*, forfeiture of the place wasted, and treble damages), and did not prevent the property in timber severed from the land from passing to the landlord. But ultimately it was settled that the privilege extended also to vest such timber in the tenant, and that the only limitation was that the waste should not be malicious, extravagant, or “humorous.”⁴⁴

Neither, under the statute of Marlebridge and Gloucester, does an action for waste lie against a tenant at will, the statutes applying in terms only to tenants for life and for years. But although a tenant at will cannot be sued for waste *eo nomine*, yet the commission of an act of destruction, which in a tenant for years or

⁴³ 2 Min. Insts. 618; 2 Bl. Com. 282; 3 Th. Co. Lit. 247; Bac. Abr. Waste (H).

⁴⁴ Ante, § 382; 2 Min. Insts. 618, 619; 2 Story, Eq. Jur. § 915; Bac. Abr. Waste (N).

life would be waste, determines the estate of tenant at will, and he is then liable to an action for the waste as for a trespass. Hence it is frequently, but inaccurately, said that tenant at will is liable for voluntary waste, meaning that he is liable for such acts as in other tenants are voluntary waste, but in him are trespasses. For permissive waste, it is established that, under the statutes in question, tenant at will is not liable, but only by virtue of express stipulations.⁴⁵

§ 392. **Punishment for Waste.** At common law the punishment for waste was merely the actual damage thereby occasioned to the owner of the inheritance, in contradistinction to the treble damages and forfeiture of the place wasted exacted by the statute of Gloucester.⁴⁶

§ 393. **The Persons Entitled to Complain of Waste.** As waste is a permanent injury to the inheritance, it follows that it cannot be committed, at least to be properly styled waste, save against one who is the owner of the inheritance, and not against one who is proprietor merely of a less estate, notwithstanding he may be injured by the act in question. It is also an established principle of the common law that the party complaining must have the immediate inheritance without an intermediate estate of freehold, for an intervening estate for years is no impediment. Hence, if a lease be made to A. for life, remainder to B. for life, remainder to C. in fee, no action of waste lies for C. during the continuance of B.'s estate, but only in case B. dies, or surrenders his estate. But if the lease were to A. for life, remainder to B. for years, remainder to C. in fee, an action lies presently for any waste committed by A. during the term in remainder, the mean term for years being no impediment.⁴⁷

But although no action of waste lies where there is such an intermediate estate of freehold, yet if waste be done by felling timber, the person entitled to the inheritance may seize or maintain an action for the trees; for as soon as they are severed from the land by an act of God, or of the tenant, or otherwise, they become the property of him who has the first estate of inheritance.⁴⁸

Still it is manifest that the reversioner or remainderman, although he has not the immediate inheritance, and notwithstanding

⁴⁵ 2 Min. Insts. 619; 1 Th. Co. Lit. 644, 645, note (19); Bac. Abr. Waste (H).

⁴⁶ 6 Edw. I, c. 5. See 2 Min. Insts. 621; 2 Bl. Com. 283.

⁴⁷ 2 Min. Insts. 622; 3 Th. Co. Lit. 245.

⁴⁸ 2 Min. Insts. 622; 3 Th. Co. Lit. 246, note (Q); Pagets' Case, 5 Co. 79b; Bowles' Case, 11 Co. 81b; Pigot v. Bullock, 1 Ves. Jr. 484; Whitefield v. Dewit, 2 P. Wms. 241.

the existence of an intervening freehold, may suffer damage, as the person entitled to such interposed estate also may, from any such destruction or permanent injury to the inheritance; and it would be a reproach to the law if it allowed no redress for that damage, simply because the wrong did not amount to what is technically styled waste. Accordingly, such wrong committed against a person who either has not the inheritance, or not the immediate reversion or remainder in fee, is designated quasi waste, and is redressed, not by the action of waste, but by action on the case, and that whether the waste be voluntary or permissive.⁴⁹

And upon the principle that waste is a wrong not in general capable of being completely repaired by damages to all interested in the premises, whether they have an inheritance or not, or the immediate reversion or not, a court of equity is accustomed to interpose by way of injunction to prohibit its commission, and, as incident thereto, to compel an account of the damage already done. Thus a tenant for life in remainder, though he has no property in the timber which may be severed, nor any right to cut it himself when the estate comes into his possession, yet has such an interest in the mast and shade of the trees as will justify a court of equity, at his instance, in enjoining the tenant from cutting them.⁵⁰

And although, in such case, there be no person capable of maintaining an action at law, and although, yet further, the party guilty of the waste dies, so that the wrong is finally remediless at common law, yet, wherever the question is brought within the cognizance of equity, that court says that unauthorized waste shall not be committed with impunity; and the produce of the wrongful act shall not redound to him who perpetrated it, but shall be laid up for the benefit of the contingent remainderman, and the whole succession of limitations.⁵¹

Upon like principles, wherever there is an equitable lien (e. g., that of a vendor), or, indeed, any equitable estate, the party claiming it may obtain redress for and against the waste by injunction in equity.⁵²

⁴⁹ 2 Min. Insts. 623; 3 Th. Co. Lit. 241, note (M); *Greene v. Cole*, 2 Saund. 252, note (7); *Kinlyside v. Thornton*, 2 W. Bl. 1111; *Harnett v. Maitland*, 16 M. & W. 262; *White v. Wagner*, 4 Har. & J. (Md.) 373, 7 Am. Dec. 674; *Fay v. Brewer*, 3 Pick. (Mass.) 203.

⁵⁰ 2 Min. Insts. 623, 624; *Perrot v. Perrot*, 3 Atk. 95; *Roswell's Case*, 1 Roll. Abr. 377; *Bewick v. Whitfield*, 3 P. Wms. 266, 268, note (F).

⁵¹ 2 Min. Insts. 624; 2 Bl. Com. 281, note (18); *Bishop of Winchester v. Knight*, 1 P. Wms. 407; *Anon.*, 1 Ves. Jr. 93; *Williams v. Bolton*, 1 Cox, 72; *Powlet v. Bolton*, 3 Ves. 377; *Tullit v. Tullit*, 1 Ambl. 376; *Pigot v. Bullock*, 1 Ves. Jr. 479, 484, notes.

⁵² 2 Min. Insts. 624; *Clarke v. Curtis*, 11 Leigh (Va.) 559, 37 Am. Dec. 625.

Tenants in common, joint tenants, and coparceners are not allowed, at common law, to sue one another for waste of the premises, because they may at any time arrest the waste by entering thereon, and possessing themselves of their respective shares. This defect in the law was, in England, remedied by statute 13 Edw. I, c. 22, which, in terms, was applicable to tenants in common alone, but whose equity was held to embrace joint tenants also, although not coparceners, because they could obtain redress by compelling partition.

An heir cannot maintain an action for waste done in the time of his ancestor, nor a grantee of the reversion for such as was committed before the grant, because neither had any interest at the time the waste was done.⁵³

And as waste is a tort not in itself savoring of contract, although it may be a breach of contract, the action for it does not, at common law, survive in favor of the landlord's personal representative, nor against the tenant's, upon the death of either, in pursuance of the common-law doctrine that every action for tort dies with the person, although actions *ex contractu* survive. By statute 4 Edw. III, c. 7, this principle was so altered as to admit of the actions surviving in case of torts to personal property; but as that statute did not apply to real property, no action for waste survived for or against a decedent's estate under it any more than at common law.⁵⁴

And in equity, even in England, relief may be had, notwithstanding the wrongdoer's death, in pursuance of the general doctrine which prevails in the Court of Chancery, in all cases of fraud, that the remedy never dies with the person, but that the court will follow the assets of the party liable to the demand into the hands of his personal representatives.⁵⁵

§ 394. Remedies for Waste⁵⁶—I. Injunction in Equity. The courts of equity, upon bill exhibited therein, complaining of waste,

⁵³ 2 Min. Insts. 625; 3 Th. Co. Lit. 243, 244, note (N); *Greene v. Cole*, 3 Saund. 252, note (7).

⁵⁴ 2 Min. Insts. 625; 1 Chitty. Pl. 78 et seq., 102; 3 Th. Co. Lit. 244, note (O).

⁵⁵ 2 Min. Insts. 625; *Bac. Abr. Waste* (O); *Garth v. Cotton*, 1 Ves. Sr. 524, 526.

⁵⁶ Besides the remedies here discussed, there were formerly, and still are theoretically, two other remedies, namely: (1) The writ of *estrepement*, occurring in a pending suit for lands and prohibiting the defendant from committing waste thereon pending the suit, 2 Min. Insts. 626; and (2) the writ of waste, formerly used to recover the place wasted as well as treble damages, and therefore a mixed action. The action of trespass on the case has for all practical purposes taken its place. 2 Min. Insts. 629 et seq., 631.

have for more than two centuries been accustomed to grant an injunction in order to stay waste, upon the ground that damages constitute an inadequate compensation for such an injury as waste, which affects the substance of the inheritance, or that otherwise there is no sufficient remedy at law. And this is now become the most usual way of preventing waste, especially as the court not only inhibits the commission of any future injury of the sort, but as incident thereto obliges the defendant to account for the damages sustained by the plaintiff in consequence of that already done.⁵⁷

The other considerations which give occasion to a court of equity's interference to prevent waste are very multiform, as that the plaintiff has only an equitable title; that the waste apprehended is the destruction of timber trees planted or reserved, not for timber, but for ornament, shade or shelter, etc.; that the tenant, being without impeachment of waste, is about to commit a destruction, wanton, malicious, or peculiarly ruinous to the property; that the apprehended waste will be mischievous to owners of the inheritance not yet in being, or not ascertained; that the owner of the inheritance colludes with the tenant committing the waste, to the detriment of intervening remaindermen; that some other collusion exists by which the legal remedies against waste are evaded, or that in any other way a permanent injury to the substance of real property by the tenant will go unredressed unless equity shall intervene. But it must not be forgotten that, wherever there is an adequate redress without such extraordinary aid of the court of equity, its interposition must be denied.⁵⁸

Neither vague apprehension of an intention to commit waste, nor information given by a third person, who states only his belief, but not the grounds of it, will sustain an application for an injunction. The affidavits need not necessarily set out positive acts, but they must state at least explicit threats. A court of equity never grants an injunction on the notion that it will do the defendant no harm, if he does not intend to commit the act in question. Some positive and sufficient reasons must be shown to call for it.⁵⁹

It will be observed that it is vain to expect the aid of a court of equity, save only in case of equitable waste, if nothing is sought but

⁵⁷ 2 Min. Insts. 627, 628; 3 Bl. Com. 227; 4 Kent, Com. 77; *Miller v. Wills*, 95 Va. 337, 28 S. E. 337; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572.

⁵⁸ 2 Min. Insts. 628; 2 Bl. Com. 282, note (22); *Mitford*, Eq. Pl. 123; 2 Story, Eq. Jur. § 911 et seq.; *Bac. Abr. Waste* (N), (O); *Norway v. Rowe*, 19 Ves. 155; *Clarke v. Curtis*, 11 Leigh (Va.) 559, 577, 582, 37 Am. Dec. 625.

⁵⁹ 2 Min. Insts. 628; *Hannay v. McEntire*, 11 Ves. 54; *Coffin v. Coffin*, Jac. 72; *Hext v. Gill*, 7 Ch. App. 699.

amends for waste already committed. Equity (except in case of equitable waste) takes cognizance exclusively to avert future waste, but, having once got possession of the cause, will complete the redress by compelling the offending tenant to account for the waste done, in order to avoid a needless multiplication of suits.⁶⁰

It is a general rule that, in order to sustain an application for an injunction in restraint of waste, the party making the application must set forth and verify an express and positive title in himself (or in those whose interests he has to support). An hypothetical or disputed title will not suffice.⁶¹ Hence, when the title is disputed, as between devisee and heir at law, an injunction to stay waste will not be granted, on the application of either party.⁶²

§ 395. Same—II. Trespass on the Case. In former times, when the punishment for waste was the place wasted and treble damages, these were recoverable in a single action known as the writ of waste. This action lay only for technical legal waste, and not for quasi waste,⁶³ and hence lay only in favor of the owner of the inheritance.

But the action of trespass on the case for waste has long practically superseded the writ of waste, as well in England as in the United States. The plaintiff derives the same benefit from it as from an action of waste in the tenuit; that is, where the tenant's term is expired, and the landlord, having regained possession of the land, by virtue of his reversion, can, in the nature of things, have no other redress than to recover damages; and although the plaintiff cannot, in an action on the case, recover the place wasted when the tenant is still in possession, as he may do in an action of waste in the tenet, yet this latter action was found, by experience, to be so imperfect and defective a mode of recovering seisin of the place wasted, that the plaintiff derived little or no advantage from it; and, therefore, where the lease is by deed, care is or ought to be taken to give the lessor power of re-entry in case the lessee, underlessee, or assignee of either, commit any waste or destruction, and an action on the case is then better adapted for the recovery of mere damages than an action of waste in the tenuit. It has also this further advantage over an action of waste, an advantage already repeatedly referred

⁶⁰ 2 Min. Insts. 629; 2 Rob. Pr. (1st Ed.) 230; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169, 9 Am. Dec. 295; *Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 122; *Armstrong v. Wilson*, 60 Ill. 226.

⁶¹ 2 Min. Insts. 629; *Davis v. Leo*, 6 Ves. Jr. 787.

⁶² 2 Min. Insts. 629; 2 Bl. Com. 282, note (22); *Jones v. Jones*, 2 Meriv. 174; *Smith v. Collyer*, 8 Ves. 90.

⁶³ Ante, § 392.

to, namely, that it may be brought by him in reversion or remainder for life or years, as well as in fee, and whether the reversion be immediate or not. The action on the case, however, did not at first prevail without considerable opposition, although at length it is definitely established as the usual and the preferable remedy, as well for permissive as for voluntary waste, and as well against the assignee of the tenant as against the tenant himself.⁶⁴

§ 396. **Same—III. Assumpsit and Covenant.** These remedies are treated together because, although at common law they can never be concurrent, yet they are strictly correlative; the action of covenant lying when the agreement not to commit waste is under seal, and trespass on the case in assumpsit when the agreement is not under seal.

For voluntary or commissive waste, trespass on the case is the most usual remedy; but if there is also a demand for money, as for rent, or for damages for some breach of contract other than the doing of waste, it may be more eligible to join in one suit the claim for damages for waste and that for the money, or for the breach of other contracts, and then the action must be assumpsit or covenant. There seems to be no doubt that, in case of an agreement not to do waste, the landlord has his election, in case of waste done, to bring either case for the waste, or the appropriate action for the breach of the agreement. If by the special agreement the landlord acquires a new remedy, he does not therefore lose that which he had before.⁶⁵ And sometimes it will be advantageous to the lessor to prefer the action on the agreement; for whilst destruction wrought by the act of God, or of a public enemy, or other inevitable accident, is not waste, and therefore no action lies for it as such, yet if the lessee has obliged himself by agreement to rebuild or repair, without making any exception, he is bound to do it at common law, even though the injury be brought about, without his default, by the act of God, or other inevitable casualty.⁶⁶

On the other hand, it may sometimes be expedient to eschew the action upon the agreement and bring trespass on the case for the waste.

⁶⁴ 2 Min. Insts. 632; 3 Bl. Com. 227, note (7); *Jefferson v. Jefferson*, 3 Lev. 130; *Jeffer v. Gifford*, 4 Burr. 2141; *Greene v. Cole*, 3 Saund. 252, note (7); *Provost of Queen's College v. Hallett*, 14 East, 489; *Harnett v. Maitland*, 16 M. & W. 257, 262.

⁶⁵ 2 Min. Insts. 633; *Kinlyside v. Thornton*, 2 W. Bl. 1111, 1113; *Greene v. Cole*, 3 Saund. 252, note (7); *Pomfret v. Ricroft*, 3 Saund. 323b, note (7).

⁶⁶ 2 Min. Insts. 633; *Walton v. Waterhouse*, 3 Saund. 422, note (2); *Chesterfield v. Bolton*, Com. 627; *Bullock v. Dommitt*, 6 T. R. 650; *Brecknock Nav. v. Pritchard*, 6 T. R. 750; *Ross v. Overton*, 3 Call (Va.) 319, 2 Am. Dec. 552; ante, § 370.

PART II.

THE VARIOUS ESTATES IN LAND AS RESPECTS THE QUALIFICATIONS OF INTEREST.

CHAPTER XX.

USES.

- § 397. Origin, Nature and History of Uses.
- 398. The Peculiar Qualities of Uses.
- 399. Same—Flexibility of Uses.
- 400. Modes of Creating Uses—Conveyances Operating with and without Actual Transmutation of the Possession.
- 401. The English Statute of Uses, Its Operation and Effect.
- 402. Circumstances Necessary to Operation of Statute.
 - 1. Person Seised to the Use.
- 403. 2. Cestui Que Use in Esse.
- 404. 3. Use in Esse.

§ 397. **Origin, Nature and History of Uses.** Uses and trusts are in their origin the same, and in their nature very similar. They both were derived from the *fidei commissum* of the Roman law, which usually was created by will, and was the disposal of an inheritance to one, in confidence that he should convey it, or dispose of the profits, at the pleasure of another. And the execution of such trusts having, before the time of Augustus, been left to the honor of the trustee, that emperor, in view of some gross instances of unfaithfulness, instituted a particular magistrate, the *prætor fidei commissarius*, to enforce the observance of the confidence reposed.¹

The simplicity of the common law, for the most part, eschewed the idea of one man being the ostensible owner of lands, whilst another was entitled to the beneficial enjoyment, or profits, holding such an arrangement to be repugnant to the professed object of the transaction, unfriendly to the interests of society, and calculated to encourage fraud. Yet, even at common law, similar provisions, under other names, were not wholly unknown. Thus, during the reigns of Edward II and Edward III, Mr. Reeves mentions various instances of *feoffments on condition*, *entries in auter droit*, etc., which had the effect of creating, to some small extent, a separation between the actual and beneficial ownership. It is admitted, however, that these property arrangements assumed a much more decid-

¹ 2 Min. Insts. 204; 2 Bl. Com. 327; 1 Spence, Eq. Jurisd. 436.

ed shape than they had ever had before, in the latter part of the reign of Edward III (about A. D. 1370); the statute 50 Edw. III, c. 6 (A. D. 1377), containing provisions alluding to the taking of the profits of lands as apart from their occupancy, in the manner of what was afterwards called a use. The introduction of uses at that period is generally ascribed to the craft of the ecclesiastics, who expected thus to evade the existing statutes of mortmain, which forbade corporations, and especially religious corporations, to acquire lands, but did not extend the prohibition to uses. Blackstone is of opinion that the countenance which uses received, and the very rapid adoption of them throughout the realm, were owing to the protection of the Court of Chancery, presided over by an ecclesiastic; but the later and more thorough explorations of Mr. Spence have proved it more than probable that the ecclesiastics derived little benefit from the Court of Chancery, which was, indeed, in the latter years of Edward III, presided over by a succession of laymen, and was not acknowledged as having a right to the vast powers it has since exercised, until after the statute 15 Ric. II, c. 5 (A. D. 1392), had deprived the church of the future fruits of the enterprising ingenuity of the clergy, by embracing uses, as well as lands, within the purview of the statutes of mortmain.²

The truth seems to be that, while uses were probably at first devised and largely employed by the clergy, they were welcomed with eagerness by the bulk of the population, who found in them the relief they coveted from the doctrine of feuds, which society had partially outgrown. At all events, this newly devised qualification of ownership flourished vigorously, partly by a judicious selection of trustees, partly by the ghostly influence of the confessional, and in part by the protection afforded by the king in council, and in some instances by the Parliament itself.³

Notwithstanding the clergy lost the peculiar benefit of uses by the statute 15 Ric. II, c. 5, yet they spread with rapidity amongst the laity, and during the civil commotions between the houses of York and Lancaster (A. D. 1399 to 1485) grew almost universal as a means of securing estates against forfeitures, whilst each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore about the reign of Henry V (A. D. 1415), it being no longer possible, in consequence of the vast multiplication of uses and trusts, to leave their enforcement to the dictates of honor, the coercion of the confessor, or the precarious interposition

² 2 Min. Insts. 204, 205; post, § 878.

³ 2 Min. Insts. 205; 2 Bl. Com. 271, 328; 1 Spence, Eq. Jurisd. 339, 440; 3 Reeves, Hist. Eng. Law, 176 et seq.

of the Crown or the Parliament, the Chancellor, as judge for matters of conscience, began to entertain applications to compel their observance, which became progressively more numerous until the reign of Edward IV (A. D. 1461), when they assumed, under the forming hand of the court of equity, some regular system.⁴

At first it was held that the chancery could give no relief except against the trustee himself, and not against his heir or alienee. In the reign of Henry VI (A. D. 1422 to 1461), this doctrine was changed with respect to the heir, and afterwards, by parity of reason, with respect to such alienees as either paid no valuable consideration, or purchased with notice of the trust. But a purchaser for value, without notice, might hold the land, as he may still, discharged of the trust.⁵

§ 398. **The Peculiar Qualities of Uses.** The qualities admitted to pertain to the use, that is, the interest of *cestui que use*, will sufficiently show why they were so acceptable to the laity of England. Thus, whilst it was held that nothing could be granted to a use whereof the use is inseparable from the possession, as annuities, ways, commons, *quæ ipso usu consumuntur*, or whereof the seisin could not be instantly given, and that a use could not be raised without a sufficient consideration, either valuable or of natural love and affection, at least where there was no actual transfer of the possession of the land to a trustee, yet, when once created, the courts of equity ascribed to them the following attributes: First, uses were descendible to heirs, according to the rules of the common law; second, uses might be assigned by deed only, without livery of seisin, and be devised by will, qualities of great value and importance, which the English people had enjoyed (at least the power to devise) before the Conquest, and the privation of which, by the introduction of feuds, soon after that event, they had never ceased to deplore; third, uses were not liable to the feudal burdens, being held of nobody, and although the lands were liable in the hands of the trustee, yet care was taken to have such a trustee as would make those burdens as few and as light as possible; fourth, dower and curtesy were neither allowed, no trust being declared for the benefit of the consort at the original creation of the use; fifth, uses were not liable for the debts of *cestui que use*, the common-law courts not acknowledging his interest, and therefore, of course, having no process by which to reach and subject it.⁶

⁴ 2 Min. Insts. 205; 2 Bl. Com. 329; 1 Spence, Eq. Jurisd. 443.

⁵ 2 Min. Insts. 205; 2 Bl. Com. 329; 1 Spence, Eq. Jurisd. 445.

⁶ 2 Min. Insts. 206; 2 Bl. Com. 330; 1 Spence, Eq. Jurisd. 441, 446.

Some of these attributes were open to very serious objections, most of which were removed by statute in less than one hundred years after the first prevalence of uses. Thus they were subjected to debts of cestui que use, against whom, if in the actual enjoyment of the profits, actions for the freehold were also allowed to be brought; he was made liable for waste, if he had not the inheritance; and finally, his conveyances and leases, although without the concurrence of his trustees, were established.⁷

§ 399. **Same—Flexibility of Uses.** Of the several characteristics of uses mentioned in the preceding section, by far the most permanent and important in its ultimate consequences was that which dispensed with the common law requirement of livery of seisin for their transfer.

This peculiarity of uses introduced into the conveyancing of land modes of transfer and of creating estates not tolerated by the common law, because of its rules regulating seisin. For instance, estates of freehold in uses could be made to commence or spring up in futuro, without any preceding estate—in which case they were denominated springing uses—a thing impossible at common law in the case of legal estates because the freehold could not be in abeyance. And so a freehold use, when once vested, might be made to

⁷ 2 Min. Insts. 206; 2 Bl. Com. 332; 1 Spence, Eq. Jurisd. 461 et seq. These provisions all tended to consider cestui que use (that is, the beneficiary) as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. VIII, c. 10 (A. D. 1536), usually called the statute of uses, or more accurately, the statute for transferring uses into possession. The hint seems to have been derived from what was done at the accession of King Richard III, who, when Duke of Gloucester, having been frequently made feoffee to uses (i. e., trustee), would, upon his assumption of the crown (as the law was then understood), have been entitled to hold the lands discharged of the use. To obviate so notorious an injustice, the act 1 Ric. III, c. 5 (A. D. 1483), was immediately passed, which ordained that, if the king had been joint feoffee, the land should vest in the other feoffees, as if he had never been named; and where he was sole feoffee, the land itself should vest in the cestui que use, in like manner as he had the use. And so the statute of 27 Hen. VIII, c. 10 (A. D. 1536), after reciting the various inconveniences attending uses (amongst which are enumerated the loss to the king and other feudal lords, of wardships, marriages, and other oppressive feudal incidents, the continued insecurity to purchasers, the defeat of curtesy and dower, and, in general, "the trouble and unquietness and utter subversion of the ancient laws of the realm," which resulted from "the imaginations and subtle inventions and practices" which went under the name of uses, trusts, and confidences), enacted that, wheresoever one person by any ways or means whatsoever should be seised of lands or tenements to the use of another, the possession of the person so seised should be transferred to him who had the use, in like quality, manner, form and condition as he had before in the use. 2 Min. Insts. 207; 2 Bl. Com. 333; 1 Spence, Eq. Jurisd. 463.

shift from one to another upon the happening of a future contingency—in which case, it was termed a shifting use—another thing impossible under the rules of the common law because of the rule requiring a re-entry of the grantor or his heirs to terminate a freehold estate upon condition subsequent, the grantor upon such re-entry being seised of his original estate by paramount title, thus wiping out all subsequent limitations and preventing a shifting of the estate to the second taker.⁸

Again, at the pleasure of the creator of a use, existing uses might be revoked, and new ones limited, according to the stipulations of the instrument of creation; or extraordinary powers of disposition might be conferred upon individuals outside of and beyond any power naturally and legally arising out of their interest in the land, and, indeed, even though they have no interest therein. These are known as powers of appointment to uses.⁹

Inasmuch as the statute of uses converts these uses into legal estates, providing that the legal estate of *cestui que use* in the land should be “after such quality, manner, form and condition” as he before had in the use, it follows that it has become possible, since the statute of uses, to create at law all the various interests above described which formerly could be had in the use alone, in defiance of the common law principles of *seisin*; all that is necessary being first to create a use, which the statute promptly converts into a legal estate after the same “quality, manner, form and condition.”¹⁰

Thus was introduced into the law of conveyancing a flexibility unknown to the original common law. In this respect the statute of uses has been, and still is, of the utmost importance. By virtue of it there may now be created legal estates of freehold or inheritance, which spring up at a future time, without a preceding estate; or which, though vested, may be divested and shift upon a future event from one person to another; or which may be made revocable by the owner; or which may be disposed of under a power of appointment, though the person exercising the power have no interest in the land or a less or different interest. Such limitations have been given the generic name of executory limitations.¹¹

It should be noted, in passing, that the statute of uses is not the only statute that allows of these results, though it was the first of

⁸ This has been explained at some length in speaking of estates for years to commence in futuro and to shift (*ante*, § 326), and will be discussed again hereafter (*post*, §§ 676 et seq., 680 et seq.).

⁹ 2 Min. Insts. 212. See *post*, § 1041 et seq.

¹⁰ 2 Min. Insts. 212.

¹¹ 2 Min. Insts. 212; 3 Th. Co. Lit. 123, 578, note (A); 2 Bl. Com. 334, note (51); Gilbert, *Uses*, 152, Sugden's note (5). See *post*, § 675 et seq.

the kind. The statute of wills, allowing legal estates to be created by will, has a like effect and for the same reason, namely, because it dispenses with the necessity for livery of seisin to create freehold estates, thus permitting springing and shifting devises (generically termed, executory devises), just as there might be springing and shifting uses.¹²

§ 400. **Modes of Creating Uses—Conveyances Operating with and without Actual Transmutation of the Possession.** In considering the modes of creating uses it should be observed that, if the interest to be created in the use is an estate of inheritance, the common law required the same technical words of limitation (heirs or heirs of the body, etc.) for its creation as if it were a legal estate of inheritance.¹³

Uses might be created in two general ways: (1) By conveyances of feoffment (or fine or common recovery), with actual transmutation of the legal title and possession from the creator of the use (the feoffer) to a third person (the feoffee to uses or trustee) for the use and benefit of cestui que use, as where A. enfeoffs B. of land with livery of seisin to the use of C. (cestui que use); or (2) by mere agreements between the creator of the use and cestui que use that the former should hold the legal title to his land as before, but should hold it to the use of cestui que use, as where A., for valuable consideration or in consideration of natural love and affection, agrees or covenants to stand seised of land to the use of C. (cestui que use). Such agreements or conveyances raise a use in C. without any actual transmutation of the legal title and possession from A. to any third person.¹⁴ These agreements in their origin are mere executory contracts on the part of him who is seised of the land, and must at common law either be supported by a valuable consideration moving from cestui que use, or on his behalf, in which case it is known as a bargain and sale, or must be under seal and supported by a consideration of natural love and affection (that is, cestui que use must be related to him who is seised), in which case it is known as a covenant to stand seised.¹⁵

§ 401. **The English Statute of Uses, Its Operation and Effect.** The effect of the English statute of uses, 27 Hen. VIII, c. 10, is to transfer the possession of him who is seised of lands and tenements to him who has the use, for the estate which he has in the use, so that cestui que use is thenceforward seised of the land, as

¹² 2 Min. Insts. 430 et seq.; Fearne, Cont. Rem. 386, note (6), 382, note (a).

¹³ 2 Min. Insts. 212; 2 Th. Co. Lit. 576, note (A); Gilbert, Uses, 143, note (1).

¹⁴ 2 Min. Insts. 208.

¹⁵ 2 Min. Insts. 208; Gilbert, Uses, 187 et seq., 242 et seq.

fully and completely as if he had been enfeoffed thereof, with livery of seisin. The statute was said thus to execute the use, by turning it into an estate in possession in the lands.¹⁶

The statute enacts substantially that wherever any person is seised of any lands, tenements, or hereditaments to the use, confidence or trust of any other person, by reason of any bargain, sale, feoffment, fine, recovery, covenant, agreement, will or otherwise, by any manner or means, whatsoever it be, for any estate whatsoever, the cestui que use shall be deemed in lawful seisin and possession of such lands, etc., of such like estates as he had in the use. And these words are so comprehensive as to embrace devises, although the statute of wills was not enacted until 32 Hen. VIII.¹⁷

Conveyances operating with actual transmutation of the possession are conveyances which operate, at common law, to transfer the estate to the trustee (e. g., feoffment, fine, common recovery, etc.), and which declare at the same time the uses and trusts to which the trustee is to be seised. Thus of this class is a feoffment, with livery, to the trustee and his heirs, in trust for, or to the use of (the form of the phrase is immaterial), cestui que use, where the common law operates to transfer the estate to the trustee, and the statute then passes the trustee's seisin to cestui que use.¹⁸

This class of conveyances is used in marriage settlements, and in other instances where it is desired to create future uses, in favor of persons not in being, or not ascertained.¹⁹

Conveyances operating without actual transmutation of the possession are at common law mere agreements, operating no transfer of title or possession, but when founded on proper consideration (i. e., a valuable consideration, or a consideration of natural love and affection) were sufficient before the statute to raise a use in the beneficiary, which use the statute executes, by transferring the seisin of the bargainor or covenantor to cestui que use, for the estate he had in the use. To this class belong conveyances by bargain and sale (founded on valuable consideration), and by covenant to stand seised (founded on consideration of natural love and affection).²⁰

§ 402. Same—Circumstances Necessary to Operation of Statute—1. Person Seised to the Use. The statute by express words requires that there should be a person seised to the use. All persons

¹⁶ 2 Min. Insts. 207; 2 Bl. Com. 333.

¹⁷ 2 Min. Insts. 208; Gilbert, Uses, 356, note (21); 1 Spence, Eq. Jurisd. 463.

¹⁸ 2 Min. Insts. 208.

¹⁹ 2 Min. Insts. 208; Gilbert, Uses, 163, note (5), 398, note (2).

²⁰ 2 Min. Insts. 208; Gilbert, Uses, 187 et seq., 242 et seq.

capable of being seised to uses before the statute may be seised to uses under it, and none others. Hence disseisors, abators and intruders cannot be seised to uses, nor, at common law, aliens.²¹

And as to the estate of which a person may be seised to a use, it may be any freehold, as is imported by the word "seised." But if the use is greater than the estate of the person seised, the statute ceases to operate upon the termination of that estate, but will be effectual in the meantime. In respect to the kinds of property whereof a person may be seised to a use, the statute comprehends every species of real property, corporeal and incorporeal, in possession, remainder or reversion. Nothing, however, can be conveyed to uses but that of which a person is seised, or to which he is entitled at the time.²²

It suffices, however, if at the time the estate was created there was a seisin in any one sufficient to serve all the uses declared, whatever may have become of that seisin since; so that, in order that the statute may take effect, it is only needful to show: (1) That a sufficient seisin existed at first to serve the future use, and (2) that such future use should come into being by the happening of the event upon which it is limited. Thus, if Black-acre be conveyed by feoffment to T., in fee simple, to the use of A. for life, remainder to the use of A.'s first and second sons unborn, for their respective lives, successively, remainder to the use of B., in fee simple, the estate for life is immediately executed in A., remainder to B. in fee, and then, when the sons of A. successively come into being, the original seisin in T. is not considered as exhausted of its effect, but is deemed sufficient by relation to execute or serve, not only the original uses in A. and B., but also the contingent uses in A.'s sons.²³

§ 403. **Same—2. Cestui Que Use in Esse.** If a use be limited to a person not in being or not ascertained, the statute cannot operate until a cestui que use comes into being or is ascertained. Any person capable of taking lands by a common-law conveyance may be a cestui que use; and although a man cannot at common law convey to his wife (because they are one person), yet he may covenant with another to stand seised to her use, and the statute will transfer the possession to her. In general, the terms of the statute require that cestui que use should be a different person from him who is seised; but if the use is in a manner different from the seisin, this principle is relaxed, and hence, if one seised in fee bar-

²¹ 2 Min. Insts. 209.

²² 2 Min. Insts. 209.

²³ 2 Min. Insts. 209; Gilbert, Uses (Sugden's Ed.) 293 et seq., 297, note (10); Sugden, Powers, 104, 105. This is known as the doctrine of "scintilla juris."

gains for a valuable consideration to stand seised to the use of himself for life, remainder over in fee, a new estate is, by the statute, vested in himself.²⁴

§ 404. **Same—3. Use in Esse.** The use, whilst it must exist, may be in possession, reversion, or remainder, and may be created by express declarations, or may result to the original owner by implication of law.²⁵

²⁴ 2 Min. Insts. 211; 1 Th. Co. Lit. 130.

²⁵ 2 Min. Insts. 212.

CHAPTER XXI.

TRUSTS.

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§ 405. **Origin and Nature of Trusts.** Trusts have the same origin as uses, and are of a very similar nature, although they are not, as has been sometimes said, identical. Trusts, or as Lord Bacon denominates them, special trusts, was the name originally bestowed in those cases where the person seised of the legal estate, as trustee, was charged with some discretionary power touching the subject of the confidence, so that a court of equity would not decree a conveyance to cestui que trust, as it would in case of a use. Thus, when the confidence was to sell for the payment of debts and legacies, to pay the profits to a feme covert, to make repairs, and the like, it being necessary that the estate and control should continue in the person seised, so as to enable him to accomplish the objects designed, the transaction was known as a trust. The principles and doctrines applicable to them were in general (with the exception noted) the same as in the case of uses.¹

¹ 2 Min. Insts. 214, 215; 2 Th. Co. Lit. 593, note (C); 1 Spence, Eq. Jurisd. 446, 448, 466; 1 Preston, Est. 144; 1 Stephens, Com. 343.

§ 406. **Definition of Trust Estate.** A trust estate is a right in equity to take the rents and profits of lands, whereof the legal estate is vested in some other person, called the trustee, and to compel such trustee (subject to the discretion which may be vested in him) to execute such conveyances of the land as the person entitled to the profits, who is called the cestui que trust, shall direct; cestui que trust, when in possession, being considered, in a court of law, to be tenant at will to the trustee.²

§ 407. **The Several Modes of Creating Trust Estates—Enumeration.** Trusts are either (1) direct trusts, being in fact uses unexecuted by the statute of uses; or (2) indirect trusts, being such as a court of equity creates by reason of the apparent intention of the parties or the nature of the transaction.³

§ 408. **I. Direct Trusts—Enumeration.** Direct trusts are uses which for various reasons have been held to be not executed (that is, not converted into legal estates) by the statute of uses, and which therefore are still cognizable in equity only, under the name of trusts.⁴

The intent of the statute 27 Hen. VIII was undoubtedly to do away wholly with the separation between the legal and the beneficial ownership of lands, and to abolish uses and trusts altogether, by transferring the possession of him who is seised to him who has the use, thus converting the use into the legal title; but some scruples purely technical, some founded upon considerations of general convenience, and others again growing, not unreasonably, out of the phraseology of the statute itself, led the judges to constructions which, instead of diminishing the power of the Court of Chancery over landed estates, tended rather to increase it.⁵

The instances of exceptions to the operation of the statute of uses are the following: (1) A use to the grantee of the legal estate; (2) a use upon a use; (3) an active use, that is, where a special discretion is reposed in the person seised to the use; (4) a use declared upon the possession of a term for years. The first of these is not a trust at all, but a common-law legal estate. The last three are direct trusts.⁶

§ 409. **Same—1. Use to Grantee of the Legal Estate.** The statute of uses in terms requires for its operation that one person be seised to the use of another, and hence a use limited to the grantee of the legal estate, so that he is seised to his own use, is not executed by the statute.

² 2 Min. Insts. 215.

⁴ 2 Min. Insts. 215; 2 Th. Co. Lit. 593, note (C).

³ 2 Min. Insts. 215.

⁵ 2 Min. Insts. 215; 2 Bl. Com. 335, note (52).

⁶ 2 Min. Insts. 215, 216; 1 Tiffany, Real Prop. § 90.

Thus, upon conveyance "to A. and his heirs to the use of A. and his heirs," or "to the use of A. for life," the use is unexecuted, and A. takes the legal title as at common law, and not under the statute, the declaration of the use operating merely to rebut the presumption of a resulting use in the first case, or in the last to limit and curtail the estate taken by the grantee.⁷

But if some other person, in addition to the grantee, is named as cestui que use, as in case of a conveyance "to A. to the use of A. and B.," the statute of uses applies, and the use is executed in both A. and B.⁸

§ 410. Same—2. Use upon a Use. Thus, where A., for a valuable consideration, bargains to stand seised of land to the use of Z., to the use of W., the judges held, in Tyrel's Case⁹ (about twenty years after the enactment of the statute), that, as before its enactment, no use could be engendered of a use (because it would be repugnant), so, under the statute, the courts of law were constrained to hold it void; and thus it was left again to be cherished in equity. Another, if not a better, reason for the doctrine, is assigned by Lord Bacon, namely, that the statute speaks of being "seised of lands and tenements" to the use of another; and so the case of one seised of an use is not within its purview.¹⁰

This reasoning has not satisfied the legal world. It is said that the instant the first use was executed in Z. he must be considered, in pursuance of the statute, as seised of the land, to use of W., and that the latter use should thereupon be deemed executed as well as the first. But the contrary has been long settled—that is, that a use cannot be limited on a use—and thus, as was observed by Lord Hardwicke, "a statute introduced in a solemn and pompous manner (in order to abolish uses and trusts altogether), has had no other effect than to add, at most, three words to a conveyance."¹¹

That is, if, before the statute of uses, A. had desired to create a use in B., cognizable only in equity, he would have expressed himself thus: "A. bargains, for a valuable consideration, to stand seised to the use of B.;" whereas, since the statute, the words,

⁷ 1 Tiffany, Real Prop. § 90; 1 Sanders, Uses and Trusts, 89; Meredith v. Joans, Cro. Car. 244; Ormes' Case, L. R. 8 C. P. 281; Peacock v. Eastland, L. R. 10 Eq. 17.

⁸ 1 Tiffany, Real Prop. § 90; Sammes' Case, 13 Co. 54.

⁹ 2 Dy. 155a.

¹⁰ 2 Min. Insts. 216; 2 Washburn, Real Prop. 161.

¹¹ Hopkins v. Hopkins, 1 Atk. 591; 2 Min. Insts. 216; 2 Washburn, Real Prop. 161.

in order to create a use in B., would be, "A. bargains, for a valuable consideration, to stand seised to use of Z., to the use of B."¹²

§ 411. Same—3. Active Use—Discretion Vested in Trustee. The same considerations which, before the statute, induced the courts of equity to decline to interfere with the possession of the person seised—namely, because such possession, in consequence of the discretionary power vested in the trustee, was requisite for the purpose of the transaction—led to the construction that special trusts were not executed by the statute, but remained, as before, equitable estates only.¹³

§ 412. Same—4. Use Declared upon Possession of a Term for Years. This exception to the operation of the statute arises from its phraseology, which with us seems to contemplate, and in England expressly declares, that the person in possession shall be seised—that is, possessed—of a freehold. Hence, if A., possessed of a term for years, bargains, for a valuable consideration, to hold it to the use of Z., the statute does not transfer the possession to Z., because A. is not seised, but only possessed of the term.¹⁴

It should be observed, however, that this principle does not prevent the application of the statute to create a term for years, supposing the lessor to be seised of a freehold estate. Thus A., seised in fee simple, may bargain, for a valuable consideration, or covenant in consideration of natural love and affection, to stand seised of lands to the use of Z. for a year, and the statute will immediately transfer A.'s possession to Z.'s use, so as to confer on Z. an estate for a year in the land.¹⁵

§ 413. II. Indirect Trusts—Enumeration. Trusts are said to be indirect when they arise from the evident intention of the parties, or the nature of the transaction, although without any express declaration of trust. They are divided into three classes, known as resulting, implied, and constructive trusts, all enforceable in equity, and are not within the statute of frauds (29 Car. II, c. 3, § 7), requiring declarations of trust to be in writing, being, indeed, specially excepted by section 8 of the same statute.

Such trusts arise in all those cases where it would be contrary to the principles of equity and good conscience that he in whom the legal seisin is vested should hold the property otherwise than as trustee; and they stand either upon the presumed intention of the parties, or independently of such intention are forced by oper-

¹² 2 Min. Insts. 216.

¹³ 2 Min. Insts. 216, 217; 2 Bl. Com. 335, note (52), 336.

¹⁴ 2 Min. Insts. 217; 2 Bl. Com. 336, note (52); 2 Th. Co. Lit. 593, note (C).

¹⁵ 2 Min. Insts. 217; 2 Bl. Com. 336, note (52).

ation of law upon the conscience of the person seised, as in cases of meditated fraud, notice of an adverse equity, and the like.¹⁶

Resulting and implied trusts include such interests as arise from presumed intention, which allots a beneficial ownership to some party other than him in whom is vested the legal title. Constructive trusts, on the other hand, depend on conclusions of law, independently of contract or intent, are commonly imposed in invitum, and embrace every trust arising by operation of law, which is neither implied nor resulting.¹⁷

§ 414. 1. Resulting Trusts—Enumeration. These are such trusts as, arising from the presumed intention of the parties, redound to the benefit of the grantor. They are the same in principle as resulting uses; the general rule being that wherever, upon any conveyance or devise, it appears that the grantee or devisee was intended to take the legal estate only, the equitable interest, or so much as remains undisposed of, or in the sequel fails to take effect, will result to him from whom the estate proceeded, or to his heirs.¹⁸

Parol evidence, it seems, is admissible to repel a resulting trust arising by operation of law, but not where the trust is collected from the terms of the instrument itself. Thus parol evidence may be given to show that, although the equitable interest, or part of it, appears to be undisposed of on the face of the instrument, yet the donee was intended to take beneficially, unless the instrument itself discloses that he was to take only as trustee.¹⁹

The instances of resulting trusts may be enumerated thus: (1) Where a conveyance is made of land (as by feoffment) without any consideration or any declaration of uses; (2) where a conveyance is made to a trustee, and a trust is declared as to part, the conveyance being silent as to the residue; (3) where land is conveyed upon particular trusts which fail to take effect; and (4) where a conveyance has been made of land, and the purchase money is unpaid.

§ 415. Same—A. Conveyance of Land without Consideration or Declaration of Uses, and Not Intended as a Gift. Lord Coke treats the conclusion that in such case a trust results to the gran-

¹⁶ 2 Min. Insts. 218; 2 Story, Eq. Jur. § 1195.

¹⁷ 2 Min. Insts. 218; 1 Spence, Eq. Jurisd. 508 et seq.; 2 Story, Eq. Jur. § 1195 et seq.; Cook v. Fountain, 3 Swanst. 585. Many authorities make no distinction between resulting and implied trusts, calling them all resulting trusts. The distinction is preserved here for the sake of clearness.

¹⁸ 2 Min. Insts. 218, 219; 1 Spence, Eq. Jurisd. 510.

¹⁹ 2 Min. Insts. 219; 1 Spence, Eq. Jurisd. 511, 572; 2 Story, Eq. Jur. § 1202.

tor or his heirs as dictated by natural justice, and the principle has been universally conceded.²⁰

But if a consideration is stated in the conveyance, though it be nominal only, parol evidence is not admissible, in the absence of fraud or mistake, to show that there was in fact no consideration, in order to raise a resulting trust in the grantor.²¹

§ 416. Same—B. Trust Declared as to Part of Estate Conveyed to Trustee, but Conveyance Silent as to Residue. This is in exact conformity with the general idea of a resulting trust already stated, and needs no explanation.²²

Upon the same principle, where a conveyance of land is made upon such trusts as shall be appointed, and there is a default of appointment, the trust results for the benefit of the grantor.²³ And so, if a trust is created by a will, but the beneficiary is not disclosed or cannot be discovered from the will itself, parol evidence is inadmissible, in the absence of fraud, to show who was intended, and the trust results to the testator's heirs or next of kin.²⁴

§ 417. Same—C. Land Conveyed on Particular Trusts, Which Fail to Take Effect. Thus, where a testator devises lands to trustees in trust to sell and to apply the purchase money in a particular manner, and such purpose cannot be accomplished, the fund, though it be now in money, will be considered as land, and will result to the heir.²⁵

But where parties unite in purchasing property upon certain trusts, which are later declared inoperative or void, the trust in such case is an implied rather than a resulting trust, and instead of redounding to the benefit of the grantor (who has already received the value of the land) it will redound to the benefit of those who have received the consideration.²⁶

§ 418. Same—D. Implied Vendor's Lien. Equity, in the absence of statute, regards the vendee as a trustee for the vendor to

²⁰ 2 Min. Insts. 219; 2 Th. Co. Lit. 581; 2 Story, Eq. §§ 1198, 1201; 2 Pomeroy, Eq. Jur. § 1035; 1 Perry, Trusts, § 161 et seq.; *Sims v. Sims*, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772; *Russ v. Mebius*, 16 Cal. 355.

²¹ *Leman v. Whitley*, 4 Russ. 423; *Eaves v. Vial*, 98 Va. 138, 139, 34 S. E. 978; *Pusey v. Gardner*, 21 W. Va. 469; *Russ v. Mebius*, 16 Cal. 350; *Squire v. Harder*, 1 Paige (N. Y.) 494, 19 Am. Dec. 446; *Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644; *Neill v. Keese*, 5 Tex. 23, 51 Am. Dec. 758.

²² 2 Min. Insts. 219; 2 Story, Eq. Jur. §§ 1199, 1200; 1 Perry, Trusts, § 152 et seq.; *Sims v. Sims*, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772.

²³ 2 Min. Insts. 219; 2 Story, Eq. Jur. § 1199; *Clere's Case*, 6 Co. 17.

²⁴ *Sims v. Sims*, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772.

²⁵ 2 Min. Insts. 220; 2 Story, Eq. Jur. § 1196; *Ackroyd v. Smithson*, 1 Bro. Ch. 503; *Easterbrooks v. Tillinghast*, 5 Gray (Mass.) 17.

²⁶ *Heiskell v. Trout*, 31 W. Va. 810, 8 S. E. 557.

the amount unpaid, and that whether there be any special agreement to that effect or not. It is competent, however, for the purchaser to show that, in any particular instance, the lien was waived, and such waiver may be either actual or implied. Taking a bond or note for the purchase money does not affect the vendor's lien; but a distinct and independent assurance, such as the vendee's bond with security, or a mortgage or deed of trust on the land sold, or part of it, will supersede such lien.²⁷

The doctrine of an implied lien for unpaid purchase money has been rejected in several states of this country, and has been abolished by statute in others.²⁸

§ 419. 2. Implied Trusts²⁹—Enumeration. When a trust arises from the presumed intention of the parties, and redounds to the benefit, not of the grantor, but of third persons, it may be denominated an implied trust. This, it will be observed, is rather an artificial signification to attach to the phrase, since properly every trust which grows out of the presumed intention of the parties, including resulting trusts, might be so designated, though most writers style all such trusts resulting. It is desirable, however, to discriminate, by a difference in name, between the cases where the trust, in pursuance of such presumed intention, redounds to the benefit of the grantor, and where it enures to the benefit of third persons. In the former case it may be said to be resulting, and in the latter implied.³⁰

Implied trusts are as follows: (1) Trusts arising out of the equitable conversion of land into money, and money into land; (2) trusts arising where land is conveyed to one, whilst the consideration is paid by another; (3) trusts arising from the conveyance of land to one partner, the lands having been paid for with partnership funds; and (4) trusts arising from a joint purchase and joint conveyance by and to several, and the purchase money is paid by one only, etc.

§ 420. Same—A. Equitable Conversion. The doctrine of equitable conversion grows out of the principle that equity looks upon that which, in pursuance of contract or of the directions of the

²⁷ 2 Min. Insts. 220; 2 Story, Eq. Jur. § 1217; *Redford v. Gibson*, 12 Leigh (Va.) 343.

²⁸ 2 Washburn, Real Prop. (6th Ed.) § 1028.

²⁹ These are often classified as cases of resulting trusts, and not as a separate class at all. But it is believed that the student's ideas are clarified by this further analysis of trusts arising from presumption of intention into resulting and implied trusts.

³⁰ 2 Min. Insts. 220, 221; 1 Spence, Eq. Jurisd. 509; *Dyer v. Dyer*, 2 Cox, 92, 1 White & Tud. Lead. Cas. Eq. 175.

owner, ought to be done as actually done. Hence, if a contract be made for the sale of lands, the specific performance of which might be decreed in equity, the seller is immediately regarded in equity as trustee of the land for the purchaser, and the purchaser as a trustee of the money for the seller. The vendee's interest, although no conveyance has been made, is treated in equity as real estate, and is devisable and descendible accordingly; while the vendor's interest is personalty, and passes and is disposed of as such.³¹

In the case of a contract of sale at the option of the purchaser, a conversion does not take place until the exercise of the option, so that if the vendor dies prior thereto the land vests in his heir or devisee, who holds it, however, in trust, subject to the purchaser's ultimate exercise of the option, in which event the conversion takes place by relation as before the vendor's death, and the property goes to the vendor's personal representative.³²

A contract for the sale of land devised by a will previously made by the vendor, since it converts the land into personalty, in effect revokes the devise. In such case, the will does not even operate upon the vendor's interest in the purchase money.³³ On the other hand, a devise of land which the testator has previously contracted to convey, according to the better view, passes only the legal title in the land to the devisee, unless an intention to pass the purchase money also appear.³⁴

So, though the vendee assigns his right to another and has the vendor make a deed direct to the assignee, which recites the fact of the original vendee's interest, a subsequent purchaser from the assignee takes with notice of the former ownership of the vendee, and is bound by judgment against him, duly recorded.³⁵

³¹ Ante, § 18; 2 Min. Insts. 221; *Vanmeter v. Vanmeter*, 3 Grat. (Va.) 148; *Washington v. Abraham*, 6 Grat. (Va.) 66; *Buck v. Buck*, 11 Paige (N. Y.) 170; *Young v. Young*, 45 N. J. Eq. 27, 16 Atl. 921; *Mills v. Harris*, 104 N. C. 626, 10 S. E. 704; *Masterson v. Pullen*, 62 Ala. 145; *Bender v. Luckenbach*, 162 Pa. 18, 29 Atl. 295, 296; *Leiper's Appeal*, 35 Pa. 420, 78 Am. Dec. 347. See *Coldiron v. Asheville Shoe Co.*, 93 Va. 364, 25 S. E. 238.

³² 1 Tiffany, Real Prop. § 111; 3 Pomeroy, Eq. Jur. § 1163; *Lawes v. Bennett*, 1 Cox, 167; *Edwards v. West*, 7 Ch. Div. 858; *Townley v. Bedwell*, 14 Ves. 526; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526. See *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. 1194, 115 Am. St. Rep. 880.

³³ 1 Tiffany, Real Prop. § 112; 1 Jarman, Wills, 129; *Farrar v. Winterton*, 5 Beav. 1; *Blair v. Snodgrass*, 1 Sneed (Tenn.) 1; *Donohoo v. Lea*, 1 Swan (Tenn.) 119, 55 Am. Dec. 725. But see *In re Lefebvre's Estate*, 100 Wis. 192, 75 N. W. 971.

³⁴ 1 Tiffany, Real Prop. § 112; 1 Jarman, Wills, 51; *Wall v. Bright*, 1 Jac. & W. 494; *Newport Waterworks v. Sisson*, 18 R. I. 411, 28 Atl. 336. But see *Wright v. Minshall*, 72 Ill. 584.

³⁵ *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312.

Other cases of equitable conversion may be found in preceding sections, to which the student is referred.³⁶

§ 421. Same—B. Land Conveyed to One While Consideration is Paid by Another. If it does not appear by the deed itself that a third person, other than the grantee, paid the money, the fact may be proved by parol, and the trust will be implied in favor of the person who advanced the price. But the proof which is thus to create a trust which is to override the deed must be very clear, and mere parol evidence ought to be received with great caution.³⁷

The trust must arise, moreover, at the time of the execution of the conveyance or not at all. Payment of the purchase money by the alleged cestui que trust, before or at the time of the purchase, is indispensable. A subsequent payment will not, by relation, attach a trust to the original purchase; for the trust arises out of the circumstance that the moneys of the real and not of the nominal purchaser formed at the time the consideration of the purchase and became converted into land.³⁸

The presumption, however, that a trust was intended in favor of the party advancing the money, may be repelled, not only by showing it affirmatively, by declarations or otherwise, but also by deductions derived from the relations in which the parties stand to one another. Thus, if the person who supplies the money is a parent, or standing in loco parentis to the grantee, who is an infant, or if he is the grantee's husband, the supposition that the grantee was meant to be, by implication, only a trustee, is repelled, and supplanted by the contrary presumption that the design was to make a provision for the child or wife, unless it be made clearly to appear that in the particular case the presumption is misplaced.³⁹

§ 422. Same—C. Conveyance to One Partner of Land Paid for with Partnership Funds. Upon the principles laid down in the pre-

³⁶Ante, §§ 18, 19.

³⁷2 Min. Insts. 221; *Francis v. Cline*, 96 Va. 201, 31 S. E. 10; *Whitmore v. Learned*, 70 Me. 276; *Witts v. Horney*, 59 Md. 584; *McKeown v. McKeown*, 33 N. J. Eq. 384; *Story*, Eq. Jur. § 1201.

³⁸2 Min. Insts. 222; 2 *Pomeroy*, Eq. Jur. § 1037 et seq.; 1 *Perry*, Trusts, § 126; *Dyer v. Dyer*, 2 Cox, 92, 1 *White & Tud. Lead. Cas. Eq.* 177; *Walker v. Tyler*, 94 Va. 532, 27 S. E. 434; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 19, 20, 9 Am. Dec. 256; *Foster v. Trustees of Athenæum*, 3 Ala. 302, 309; *Moore v. Mustoe*, 47 W. Va. 549, 35 S. E. 871, 81 Am. St. Rep. 812; *Bright v. Knight*, 35 W. Va. 40, 13 S. E. 63.

³⁹2 Min. Insts. 222; 2 *Pomeroy*, Eq. Jur. § 1039 et seq.; 1 *Perry*, Trusts, § 143 et seq.; *Jesser v. Armentrout*, 100 Va. 666, 42 S. E. 681; *Irvine v. Greever*, 32 *Grat. (Va.)* 417, 418; *Bank of United States v. Carrington*, 7 *Leigh (Va.)* 566; *Deck v. Tabler*, 41 W. Va. 332, 23 S. E. 721; 56 Am. St. Rep. 837; *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176.

ceding section, a trust is implied in favor of the partnership, the money having come from that source. And here, as in that case, it may be proved by parol that the money belonged to the partnership, and parol evidence may be adduced also to repel the implied trust, by showing that the parties did not design that the partner to whom the conveyance was made should take as trustee, but for his own benefit.⁴⁰

Whether the trust in favor of the partnership will be partnership assets, or will be the property of the partners as joint tenants, or tenants in common, will depend on whether it was expressly or otherwise agreed that it should be partnership stock. If bought and used for partnership purposes, with the social funds, it is scarcely possible to resist the inference that it is to be treated as partnership assets; but a similar implication does not conclusively arise from the purchase having been made with partnership money, or the property being used for partnership purposes, standing alone. When it has been once determined to be partnership assets, it is then, for all the purposes of the partnership, to be treated as personalty (except that it cannot be conveyed by one partner); and whilst, according to some opinions, it assumes the character of real property after the partnership debts have been paid, and the shares of the other partners have been provided for, that is, as to the widows, heirs, and individual creditors of the partners respectively, yet the better doctrine is believed to be that it is, to all purposes, personalty.⁴¹

§ 423. Same—D. One of Joint Grantees Paying Purchase Money beyond His Proportion. The purchaser who thus pays more than his ratable proportion will have a lien upon the land in his favor for the excess which he may have paid. And upon like principles, when one of several joint purchasers expends money in repairs and improvements, he has a lien on the land, and a trust is raised in his favor for the amount.⁴²

§ 424. 3. Constructive Trusts—Enumeration. Constructive trusts arise, independently of the intention of the parties; by construction of law, being fastened upon the conscience of him who has the legal estate, in order to prevent what otherwise would be

⁴⁰ 2 Min. Insts. 222; 2 Story, Eq. Jur. 1207 et seq.; *Brooke v. Washington*, 8 Grat. (Va.) 248, 56 Am. Dec. 142.

⁴¹ Ante, § 19; 2 Min. Insts. 222, 223, 140; *Pierce v. Trigg*, 10 Leigh (Va.) 426; *Wheatley v. Calhoun*, 12 Leigh (Va.) 265, 37 Am. Dec. 654. See *Riddle v. Whitehill*, 135 U. S. 621, 635, 10 Sup. Ct. 924, 34 L. Ed. 282; *Lang's Heirs v. Waring*, 25 Ala. 625, 60 Am. Dec. 533. See, also, *George*, Part. 127.

⁴² 2 Min. Insts. 223; *Tompkins v. Mitchell*, 2 Rand. (Va.) 428; *Hays v. Wood*, 4 Rand. (Va.) 272, 15 Am. Dec. 754.

a fraud. They occur, not only where property has been acquired by fraud or improper means, but also where it has been fairly and properly acquired, but it is contrary to the principles of equity that it should be retained, at least for the acquirer's own benefit.⁴³

Constructive trusts occur in the following cases, amongst others, namely: (1) Where a conveyance is made to a trustee personally, but is paid for with trust money; (2) where a renewal of a lease is obtained in his own name by a trustee, or other person standing in a confidential relation; (3) where purchases of the trust estate, etc., are made by trustees, etc.; and (4) where fraud has occurred in obtaining a conveyance.

§ 425. Same—A. Conveyance to Trustee Personally of Land Paid for with Trust Funds. Parol evidence is admitted to prove that the land was paid for with the trust money, although it was at one time doubted whether that did not conflict with the rule forbidding that a writing should be contradicted by verbal testimony, and also whether it was not adverse to the policy of the statute of frauds, 29 Car. II, c. 3, § 4. These difficulties, however, have been surmounted, in order to guard against the fraud, and abuse of trust, which would otherwise ensue, and whatever may have been the intention of the trustee, whether honest or otherwise, upon clear proof of the application of the trust money to the purchase, a trust will be decreed. The proof, however, that the trust money was employed, must be satisfactory, and not merely sufficient to warrant a vague conjecture.⁴⁴

And where, by direction of a Court of Chancery, land was ordered to be conveyed to a husband in trust for his wife and children, but in fact it was conveyed to the husband absolutely, the mistake was corrected, and meanwhile the land was held not to be liable to the husband's debts; for even a judgment creditor cannot occupy a higher ground than the debtor, nor subject more than the debtor's interest, which in this case was nothing.⁴⁵

Where the trustee has employed his own money, in part, to buy the land, as well as the trust money, the effect of the trust is to

⁴³ 2 Min. Insts. 223; 2 Pomeroy, Eq. Jur. § 1044 et seq.; 1 Spence, Eq. Jurisd. 511; Keech v. Sanford, 2 Eq. Cas. Abr. 741, 1 White & Tud. Lead. Cas. Eq. 48 et seq., 53 et seq.

⁴⁴ 2 Min. Insts. 224; 2 Story, Eq. Jur. § 1210; 2 Pomeroy, Eq. Jur. § 1048 et seq.; Lane v. Dighton, 1 Ambl. 409, 413; Lench v. Lench, 10 Ves. 517; Buckeridge v. Glasse, 1 Cr. & Phil. 134; Dyer v. Dyer, 2 Cox, 92, 1 White & Tud. Lead. Cas. Eq. 172, 175, 178; Cook v. Tullis, 18 Wall. 341, 21 L. Ed. 933; Heth v. Richmond, F. & P. R. Co., 4 Grat. (Va.) 482, 518, et seq., 50 Am. Dec. 88.

⁴⁵ 2 Min. Insts. 224; Irvine v. Greever, 32 Grat. (Va.) 415; Mauzy v. Sellars, 26 Grat. (Va.) 641.

create a lien on the land for the amount of the trust fund so expended, but it gives no further title; and, indeed, in all cases, the cestui que trust may elect to be repaid his money, and may claim a lien on the property purchased, in order to secure it, an election which, in the case of infants, will be made for them by the court, in the manner most advantageous for them.⁴⁶

§ 426. **Same—B. Trustee Obtaining Renewal of Lease in His Own Name.** The trustee's situation, in respect to the estate, gives him access to the landlord, and to allow him to use that advantage for his own benefit would tempt him to prejudice the interest committed to him. Whatever lease he obtains by way of renewal, therefore, although it purport to be a new lease to himself, is constructively for the benefit of cestui que trust.⁴⁷

§ 427. **Same—C. Trustee Purchasing Outstanding Claims against Trust Estate.** It is a general principle, which will resolve most of the cases of this sort, that a trustee is not at liberty to act or contract for his own benefit in regard to the subject of the trust. An independent interest therein would, in its very nature, be hostile to the cestui que trust, and therefore repugnant to the relation which the trustee has assumed. The trustee can occupy no such position, unless by the special permission of a court of equity, which, of course, will take due precautions to shield cestui que trust's interests. But when cestui que trust is sui juris, and has discharged the trustee from the trust, the disqualification of the latter to purchase the subject-matter, or to act concerning it, is so far modified that he is allowed to do so, provided there is no fraud, concealment, or advantage taken of information acquired as trustee, although the transaction is even then viewed with great suspicion.⁴⁸

Hence, if a trustee purchases claims or incumbrances against the trust estate at a discount, the purchase shall enure in equity to the benefit of cestui que trust, after reimbursing the trustee for his outlay; and so joint tenants and coparceners stand in such confidential relations in regard to one another's interest that one of them is not permitted in equity to acquire an interest in the property hostile to that of the other; and therefore, if one purchase an incumbrance on the joint estate, or an outstanding title thereto, it will enure, at the election of the co-tenant within a reasonable time,

⁴⁶ 2 Min. Insts. 224; 2 Story, Eq. Jur. § 1262; *Turner v. Street*, 2 Rand. (Va.) 408, 14 Am. Dec. 792.

⁴⁷ 2 Min. Insts. 225; *Keech v. Sanford*, 2 Eq. Cas. Abr. 741, 1 White & Tud. Lead. Cas. Eq. 48, 54.

⁴⁸ 2 Min. Insts. 225; 2 Story, Eq. Jur. § 1261 et seq.; *Keech v. Sanford*, 2 Eq. Cas. Abr. 741, 1 White & Tud. Lead. Cas. Eq. 53 et seq. See 1 White & Tud. Lead. Cas. Eq. 126 et seq., 129, 145.

to the equal benefit of all. And agents are emphatically within the same principle, being disabled in equity from dealing with the matter of the agency for their own benefit.⁴⁹

§ 428. **Same—D. Conveyance Obtained by Fraud.** The fraudulent grantee in the conveyance will be regarded as constructively a trustee for the person defrauded. Thus, where a person purchases of a trustee with notice of the trust, he is guilty of fraud (even though he pay a valuable consideration), and is trustee for the person entitled to the beneficial interest. So a fraudulent purchaser is only a trustee for the honest, but deluded, vendor; an heir preventing a devise of an estate to another, by promising to perform the same personally, is a trustee to the amount of the beneficial interest intended; and an agent who, being authorized to purchase an estate for another, buys it for himself, is a trustee for his principal.⁵⁰

§ 429. **Rules Governing Trust Estates—In General.** Trust estates are in general governed by rules analogous to those controlling legal estates of the same class, except only that (1) a purchaser for valuable consideration and without notice of the trust is not bound to execute it;⁵¹ and (2) the common-law rules of seisin, with their resultant restrictions upon the power to create and transfer the legal estate, had no application to equitable estates or trusts.⁵²

Thus one who has an equitable freehold is competent to all the functions of a freeholder.⁵³ So trust estates are alienable, devisable and descendible like legal estates,⁵⁴ and, in this country, are subject to dower and curtesy, unless the instrument creating the trust negative these incidents,⁵⁵ and, like legal estates, they are liable to escheat.⁵⁶

§ 430. **Same—Trust Estate Liable for Debts and Charges of Cestui Que Trust.** It is well settled that the interest of the cestui

⁴⁹ 2 Min. Insts. 225; 1 White & Tud. Lead. Cas. Eq. 55 et seq.; Segar v. Edwards, 11 Leigh (Va.) 213; Franks v. Morris, 9 W. Va. 664; Jones v. Thorn, 45 W. Va. 186, 32 S. E. 173.

⁵⁰ 2 Min. Insts. 226; 2 White & Tud. Lead. Cas. Eq. 593; 2 Story, Eq. Jur. § 1265; 2 Pomeroy, Eq. Jur. § 1054 et seq.; Jackson v. Pleasanton, 95 Va. 654, 29 S. E. 680; Franks v. Morris, 9 W. Va. 664.

⁵¹ 2 Min. Insts. 226.

⁵² 2 Washburn, Real Prop. 189.

⁵³ 2 Min. Insts. 226; Moore v. Com., 9 Leigh (Va.) 639; Com. v. Burcher, 2 Rob. (Va.) 826.

⁵⁴ 2 Min. Insts. 227.

⁵⁵ Tiedeman, Real Prop. §§ 105, 117.

⁵⁶ 2 Min. Insts. 227, 551.

que trust may be subjected in equity to his debts and charges.⁵⁷ And it is generally held in the United States that a mere provision in the instrument creating the trust that the trust estate shall not be liable for the debts of the cestui que trust will be inoperative.⁵⁸ But where it is discretionary with the trustee whether he pay over any of the income to the cestui que trust on his becoming insolvent, or where such discretion is given to the trustee because the cestui que trust is insolvent, the creditors are powerless to reach the estate. They can stand in no better position than the cestui que trust himself.⁵⁹

§ 431. **Same—Trust Estates Merge in Legal.** Whenever the legal and trust estates come to the same persons, the trust estate is merged in the legal, for a man cannot be a trustee for himself, a proposition which, if not universal, is subject to no other exception than where the party has the whole legal estate, and only a partial equitable one, and the merger of the latter would be a disadvantage to him, in which case merger does not occur.⁶⁰

§ 432. **Same—Legal Action for Land Cannot be Maintained or Defended upon Equitable Title.** The first branch of the proposition—viz., that equitable estates will not support an action of ejectment for the land—is, strictly speaking, without exception; but lapse of time, and other circumstances, sometimes justify a presumption of the reunion of the legal title with the equitable ownership, in which case the action may be maintained, not on the equitable title, but on the presumed legal one. This presumption of reconveyance of the legal title to the beneficial owner is said to be due, not so much to the lapse of time, as to the reasonable assumption that what ought to be done has been done. Hence, when the object of the trust is satisfied, the conveyance of the legal estate may well be taken for granted, even after only a few years, unless, from the nature and object of the original creation of the legal estate in the trustees, there is no inconsistency between the equitable ownership and the fact of the legal estate being suffered to remain outstanding.⁶¹

⁵⁷ *Jackson v. Walker*, 4 Wend. (N. Y.) 462; *Clapp v. Ingraham*, 126 Mass. 200; *Hutchins v. Heywood*, 50 N. H. 491; *Easterly v. Keney*, 36 Conn. 18; 2 Washburn, Real Prop. (6th Ed.) § 1445.

⁵⁸ 2 Washburn, Real Prop. (6th Ed.) § 1446.

⁵⁹ 2 Washburn, Real Prop. (6th Ed.) § 1446; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Davidson v. Kemper*, 79 Ky. 5. A trust of this kind is called a "spendthrift trust."

⁶⁰ 2 Min. Insts. 228.

⁶¹ 2 Min. Insts. 228; *Doe v. Plowman*, 2 B. & Ad. 373; *Doe v. Langdon*, 12 Ad. & El. 719; *Garrard v. Tuck*, 8 Mann. Gr. & S. 248; *Hopkins v. Ward*, 6 Munf. (Va.) 41; *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. 631, 28 L. Ed. 993.

The defence, in ejectment, must also rest in like manner upon a legal and not an equitable title; but since the plaintiff in ejectment must recover, if at all, on the strength of his own title, and not on the weakness of his adversary's, a failure of the plaintiff to possess the legal title at the time the action is instituted, though he subsequently acquire it, will prevent his recovery, even though the defendant has only an equitable title or no title at all.⁶²

§ 433. Rights and Liabilities of Cestui Que Trust. It is still held, in conformity to the old law of uses, that pernaney (or enjoyment) of the profits, execution of estates as cestui que trust shall direct, and defence of the title, are the three great properties of a trust; so that the Court of Chancery will compel trustees (1) to permit cestui que trust to receive the rents and profits of the land; (2) to execute such conveyances as cestui que trust shall direct; (3) to defend the title of the land in any court of law or equity. But cestui que trust is entitled to a conveyance only where the whole of the trust belongs to him, where the instrument creating the trust does not forbid, and where the trustee is clothed with no discretion in the management of the trust.⁶³

No act or omission of the trustee will prejudice cestui que trust, save only that, if the trustee is in actual possession of the estate (which seldom happens), and conveys it for a valuable consideration, or mortgages it to a person who has no notice of the trust, by registry or otherwise, such purchaser or mortgagee is entitled to hold against cestui que trust.⁶⁴ On the other hand, no act of the cestui que trust can divest the trustee of his legal estate.⁶⁵

§ 434. Status of a Purchaser of the Trust Subject. Such purchaser, with notice, is himself a constructive trustee, and will be constrained to execute the trust, however valuable the consideration he may have paid; and if he sells the subject to an innocent purchaser for value, without notice, whereby it is exempted from the trust, he is personally responsible to cestui que trust for the value of the property, just as, under corresponding circumstances, the original trustee is.⁶⁶

⁶² *Merryman v. Hoover*, 107 Va. 495 et seq., 59 S. E. 483; *Carn v. Haisley*, 22 Fla. 317.

⁶³ 2 Min. Insts. 232, 233; 2 Story, Eq. Jur. §§ 979, 1275.

⁶⁴ 2 Min. Insts. 233; 2 Story, Eq. Jur. § 977; *Day v. Brenton*, 102 Iowa, 482, 71 N. W. 538, 63 Am. St. Rep. 467, note.

⁶⁵ 1 Cruise, Dig. 407.

⁶⁶ 2 Min. Insts. 233; 2 Story, Eq. Jur. § 1257; *Tompkins v. Powell*, 6 Leigh (Va.) 580; *Duncan v. Jaudon*, 15 Wall. 175, 21 L. Ed. 142; *Board of Trustees of Oberlin College v. Blair*, 45 W. Va. 812, 32 S. E. 203.

§ 435. **Same—Doctrine of "Complete Purchaser."** In order that a purchaser may be protected as an innocent purchaser, he must have paid a valuable consideration, and have become a complete purchaser by getting a conveyance of the legal title before he had notice of the trust. A valuable consideration is never mere love and affection, even for the nearest connections; but it must be a benefit to the grantor, or to a third person at his request, or some loss, trouble, or inconvenience, or the risk thereof to the grantee. A pre-existing debt is regarded as constituting a valuable consideration for a deed of trust, or mortgage to provide for it, whether the debt be thereby satisfied or only collaterally secured; and the creditor secured by such deed of trust or mortgage is thenceforward regarded no longer as a creditor, but as a purchaser.⁶⁷

The purchaser must also be a purchaser without notice, which may be either direct or constructive. Direct notice is an actual, positive knowledge of the prior incumbrance or trust, regularly communicated to the purchaser, or his agent, during the transaction, by some one interested in the subject, and therefore probably informed in relation to it. Constructive notice is no more than evidence of notice, where the presumption of it is satisfactorily warranted by the facts, or made needful by considerations of general policy. Thus a man has constructive notice of the contents of the instrument under which his vendor claims to derive his power to sell, and of any deed or will therein referred to, and of any fact which might have been learned thence. So the possession of a tenant is constructive notice of the actual interest he may have, but not of his lessor's interest; nor, it seems, is being a witness to an instrument of itself notice of its contents, since, in practice, a witness is seldom privy to the contents of the writing. A purchaser with notice from one without is protected as a part of what is due to the latter; and so, also, is a purchaser without notice from one with notice.⁶⁸

The purchaser must also be a complete purchaser; that is, he must have paid all the purchase money (not merely secured it to be paid), and have actually taken a conveyance of the legal title

⁶⁷ 2 Min. Insts. 234; *Tate v. Liggat*, 2 Leigh (Va.) 84, 104; 2 Washburn. Real Prop. (6th Ed.) § 1435; *Wolf v. Van Metre*, 23 Iowa, 397; *Hobson v. Hobson*, 8 Bush (Ky.) 665.

⁶⁸ 2 Min. Insts. 234; 1 Lom. Dig. 510 et seq.; *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715; *Duncan v. Jaudon*, 15 Wall. 175, 21 L. Ed. 142; *Cordova v. Hood*, 17 Wall. 1, 8, 21 L. Ed. 587; *Basset v. Nosworthy*, 2 White & Tud. Lead. Cas. Eq. 77 et seq., 83 et seq., 106; *Ferrin v. Errol*, 59 N. H. 234; *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388.

(and not articles, merely, to convey), before he received the notice.⁶⁹

§ 436. **Obligation of Purchaser of Trust Estate to See to Application of Purchase Money.** It is a general principle of common sense as well as of law that when one purchases property from the owner thereof, and pays for it, he is not responsible for the use the owner makes of the purchase money. A receipt given by the owner, in the absence of fraud or mistake, acquits the purchaser of all further liability. Hence, if a trustee, who in a court of law is the owner of the land, sells the same to a purchaser with or without notice of the trust, the trustee can at law give a valid acquittance to the purchaser for the purchase money, which will discharge the latter.⁷⁰

But in equity the persons amongst whom the trustee is to distribute the proceeds of the sale are considered the owners, and the court of equity therefore holds that a purchaser with notice of the trust must obtain an acquittance from them, unless the power of giving a valid acquittance has been conferred expressly or impliedly upon the trustee. If, therefore, no discharge be actually given by cestuis que trustent, and the trustee be not vested with the power to grant an acquittance, the purchaser is bound to see that the purchase money reaches the proper parties, and if the trustee misappropriates it the estate will in equity remain chargeable therewith in the hands of the purchaser.⁷¹

If the power to give receipts is expressly conferred on the trustee, or if the instrument creating the trust and giving the trustee the power of sale expressly declares that the purchaser shall not be bound to see to the application of the purchase money (which amounts to the same thing), no difficulty arises. The purchaser, in cases free from fraud or collusion, is not bound to see to the application.⁷²

⁶⁹ 2 Min. Insts. 235; *Wasserman v. Metzger*, 105 Va. 748, 54 S. E. 893, 7 L. R. A. (N. S.) 1019; *Bassett v. Nosworthy*, 2 White & Tud. Lead. Cas. Eq. 91 et seq.

⁷⁰ *Elliott v. Merryman*, Barnad. Ch. 78, 1 White & Tud. Lead. Cas. Eq. 58, 63, et seq.

⁷¹ *Elliott v. Merryman*, Barnad. Ch. 78, 1 White & Tud. Lead. Cas. Eq. 58, 63, et seq. Where a purchaser takes a leasehold or other personal property from an executor or administrator, he is never bound to see to the application of the purchase money, since it is the undoubted legal right of a personal representative (because of the indefiniteness of the trust) to dispose of his decedent's personalty, and to give acquittances or receipts for the purchase money. *Elliott v. Merryman*, supra, 69 et seq.; 2 Min. Insts. 242.

⁷² *Elliott v. Merryman*, Barnad. Ch. 78, 1 White & Tud. Lead. Cas. Eq. 58, 63, et seq.

The difficulties of the subject begin when we suppose the trustee's power to give receipts, if existing at all, to be created by implication, and to such cases the following sections are devoted.

§ 437. Same—Circumstances Essential to the Purchaser's Obligation—Enumeration. In order that a purchaser be bound to see to the application of the purchase money, or, in other words, in order that a power on the part of the trustee to give the purchaser a valid discharge be not implied, three circumstances must concur: (1) The purchaser must have notice of the trust; (2) there must be no certain hand designated to receive the purchase money; and (3) the trust must be of a defined and limited nature.

§ 438. Same—1. Purchaser must have Purchased with Notice of the Trust. It is evident that, if the purchaser takes without notice of the trust, he takes free therefrom altogether, both at law and in equity, and he justly treats the trustee as the owner. The latter's acquittance relieves him in such case from all responsibility to *cestuis que trustent*. Indeed, he never has any.⁷³

Such an obligation on the purchaser's part, therefore, can only arise where he purchases with notice of the trust.

§ 439. Same—2. No Certain Hand Designated to Receive the Purchase Money. If the instrument creating the trust expressly or impliedly designates the person to whom the purchaser is to pay the money, even though such person be not expressly authorized to give a receipt or acquittance for the same, the power is implied, and there is no obligation upon the purchaser to see to the application of the purchase money.⁷⁴

Hence, in an ordinary deed of trust to secure debts, with power of sale in the trustee, there is implied (if not expressed) a power to receive the proceeds, and therefore an implied power to give a discharge or acquittance to the purchaser, even though the debts be scheduled.⁷⁵ And so, if the trustee be authorized to sell and to reinvest in his discretion the proceeds upon like trusts, this implies that he is to receive the purchase money and hence may give a valid discharge to the purchaser. But if, in such cases, the sale itself is a breach of trust on the trustee's part, of which the purchaser has notice, either from the face of the transaction or otherwise, he is thereby made a party or privy to the trustee's misconduct, and

⁷³ 2 Min. Insts. 239; 2 Story, Eq. Jur. §§ 1124, 1125; *Hughes v. Tabb*, 78 Va. 313; *Potter v. Gardner*, 12 Wheat. 498, 6 L. Ed. 706; *Elliott v. Merryman*, Barnad. Ch. 78, 1 White & Tud. Lead. Cas. Eq. 58, 63 et seq.

⁷⁴ 2 Min. Insts. 239.

⁷⁵ 2 Min. Insts. 239.

the property is affected in his hands with the same trusts which previously attached to it.⁷⁶

It may be added in this connection that, inasmuch as this doctrine imposes sometimes a most onerous responsibility upon the purchasers of trust estates, it is enforced with caution, and the disposition of the courts is so to limit its application as to avoid the evils and hardships which would otherwise result. Hence slight circumstances are sometimes seized upon by the courts as indicating the intention to confer upon the trustee the power to discharge the purchaser by his acquittance.⁷⁷

§ 440. **Same—3. Trusts must be of Defined and Limited Nature.** The court of equity does not demand impossibilities of the purchaser of a trust estate, nor will it impose upon him onerous duties and liabilities involving such risk to him as would or might deter him altogether from purchasing the trust subject. Hence, if there is any uncertainty as to the persons to whom the proceeds are to be paid by the trustee, or as to the amount that should be paid, a power on the trustee's part to give the purchaser a valid discharge will be implied, and the purchaser is not bound to see to the application of the purchase money. To hold the purchaser liable, therefore, the trust must be of a defined and limited nature, as to pay designated legacies or scheduled debts.⁷⁸

§ 441. **Same—A. Instances of Trusts of Defined and Limited Nature.** The most prominent instance of such trusts is the case of trusts to pay legacies, annuities, or scheduled debts. In all these cases, the person and amount to be paid are ascertained, and therefore, supposing that there is no hand designated to receive the money and to grant an acquittance, the persons entitled to the proceeds of sale, and they only, are in equity authorized to do so, and so the purchaser is responsible for the application of the money to the destined trusts; and it makes no difference whether the lands are given to be sold, or only charged with the payment of debts.⁷⁹

And so, in trusts to accomplish any specific or defined object, as to build a house, or pay a specific debt, the purchaser, unless the trustee is empowered to grant an acquittance for the money, is bound to see to its application to the purposes of the trust; and

⁷⁶ *Redford v. Clarke*, 100 Va. 119, 40 S. E. 630.

⁷⁷ *Tyler v. Herring*, 67 Miss. 169, 6 South. 840, 19 Am. St. Rep. 282 et seq., note.

⁷⁸ *Elliott v. Merryman*, Barnad. Ch. 78, 1 White & Tud. Lead. Cas. Eq. 63 et seq.; 2 Min. Insts. 239 et seq.

⁷⁹ 2 Min. Insts. 239, 240; 2 Story, Eq. Jur. § 1131; *Elliott v. Merryman*, Barnad. Ch. 78, 1 White & Tud. Lead. Cas. Eq. 58, 62, et seq.

if they are not fulfilled by the trustee, the land in the hands of the purchaser will still be liable to them.⁸⁰

§ 442. Same—B. Instances of Trusts Too Undefined or of Too Long Continuance. Wherever the trust is general and unlimited in its nature, or likely to be of long continuance, it cannot be presumed that the person creating it expected so unreasonable a thing as that the purchaser should undertake it, and therefore it is implied that he intended that the trustee's receipt for the purchase money should be a valid discharge.⁸¹

Such, for example, are trusts to pay debts not scheduled, or to pay debts and legacies. This depends upon the general principles already stated. If the debts are not scheduled, it would be too unreasonable to expect that the purchaser should undertake to see to the application of the proceeds, and to demand it of him would seriously impair the salableness of the property; and so if the trust is to pay debts and legacies, as the debts are to be paid first, supposing them unscheduled, the same objection exists as before, notwithstanding the legacies are definitely ascertained.⁸²

Another instance may be found in trusts to invest money for several subjects more or less distant. This case may be exemplified by a trust directing the money arising from the sale of lands to be invested in a prescribed manner, and the accruing proceeds to be applied, from time to time, to sundry purposes. The doctrine applicable to it seems to be that the purchaser's obligation extends no further than to see that the purchase money is invested as directed. And even that obligation of the purchaser depends on whether the trust contemplates the immediate reinvestment of the purchase money, with a view to which the sale is made, or whether the reinvestment is a distinct act from the sale, to be made as opportunity offers, and requiring time and discretion. The disposition of the proceeds after reinvestment he is not bound to look after, nor even the reinvestment, unless the acts of sale and reinvestment are intended to be in immediate proximity the one to the other, because he who created the trust could not reasonably have expected from any purchaser (without prejudicing the sale of the subject) any further degree of care than during the time that the transaction for the purchase was carrying on; and, therefore, he

⁸⁰ 2 Min. Insts. 240; *Cottrell v. Hampton*, 2 Vern. 5.

⁸¹ 2 Min. Insts. 240; 2 Story, Eq. Jur. § 1130 et seq.; *Elliott v. Merryman*, Barnad. Ch. 78, 1 White & Tud. Lead. Cas. Eq. 63 et seq.; *Meeks v. Thompson*, 8 Grat. (Va.) 137, 56 Am. Dec. 134.

⁸² 2 Min. Insts. 240; 3 Hargr. Co. Lit. 290b, Butler's note; *Elliott v. Merryman*, Barnad. Ch. 78, 1 White & Tud. Lead. Cas. Eq. 63 et seq.

must be supposed to have placed his whole confidence in the trustees.⁸³

One more instance—that of trusts expected to be of long continuance. This case is like the preceding. The settlor or testator must have intended to confer upon the trustees the power to give final acquittances; for otherwise, as few purchasers would be willing to take such an obligation upon themselves, it would tend to depreciate the subject-matter.⁸⁴

But, even in these cases of undefined trusts, a breach of trust by the trustee, actually or constructively known to the purchaser, will charge him, if he in any manner co-operates therein.⁸⁵

§ 443. Duties and Obligations of Trustees—General Principles of Trustee's Duty. A trustee is bound in general to do whatever may be necessary and proper for the due execution of the trust; to defend the title at law, and, if it be useful and practicable, to give notice of any suit affecting the title to cestui que trust; to prevent waste or injury to the trust property; to keep regular accounts; to obtain, if possible, and to afford cestui que trust, accurate information touching the trust subject; to act with reasonable diligence; in case of a joint trust, to exercise due caution and vigilance touching the approval of and acquiescence in the acts of his co-trustees; and if the instrument creating the trust contains any special directions, to observe them with diligence and fidelity, exercising in all things, in respect to cestui que trust, the most transparent good faith.⁸⁶

The measure of the diligence and care required of him is said to have some analogy to that required of a bailee; that is, if, as in England, his services are gratuitous, he should be liable, like a gratuitous bailee, only for gross negligence, whilst with us, as he is always entitled to a reasonable compensation, he should, according to this rule, be answerable for ordinary neglect. These, however, are not, in point of fact, always the limits of his responsibility

⁸³ Ante, § 439; 2 Min. Insts. 240, 241; 2 Story, Eq. Jur. § 1131 et seq.; *Balfour v. Welland*, 16 Ves. 156; *Redford v. Clarke*, 100 Va. 119, 40 S. E. 630; *Taliaferro v. Minor*, 1 Call (Va.) 532; *Wormley v. Wormley*, 8 Wheat. 421, 5 L. Ed. 651; *Potter v. Gardner*, 12 Wheat. 498, 6 L. Ed. 706.

⁸⁴ 2 Min. Insts. 240; 2 Story, Eq. Jur. §§ 1133, 1134; *Broadus v. Rosson*, 3 Leigh (Va.) 28.

⁸⁵ 2 Min. Insts. 240; *Redford v. Clarke*, 100 Va. 119, 40 S. E. 630; *Wormley v. Wormley*, 8 Wheat. 421, 5 L. Ed. 651.

⁸⁶ 2 Min. Insts. 255; 2 Story, Eq. Jur. §§ 1268, 1275, 1276; *Knight v. Earl of Plymouth*, 3 Atk. 380; *Wilkinson v. Stafford*, 1 Ves. Jr. 32; *Vigo v. Emery*, 5 Ves. 141; *Winder v. Nock*, 104 Va. 759, 52 S. E. 561, 3 L. R. A. (N. S.) 415; *Taylor v. Benham*, 5 How. 233, 12 L. Ed. 130; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619, 628; *Wagner v. Coen*, 41 W. Va. 351, 23 S. E. 735.

in equity. But nothing more is, in general, required than that he should act in good faith, and with the same prudence and discretion that a prudent man exercises in his own affairs. If more than this were exacted, it would tend to the disadvantage of persons interested in trusts in general, because it would discourage competent persons from accepting the administration of trusts.⁸⁷

As to the termination of the trust, it may be observed that, though all the purposes of the trust have not been accomplished, yet if all interests under it have vested, and the beneficiaries are sui juris and desire its termination, a court of equity may so decree. If no good purpose is to be served by the continuation of the trust, and those interested will not be benefited, the mere objection of the trustee to its termination will not avail.⁸⁸

§ 444. Same—Liability of Trustee's Estate for his Own Debts. From an early period after the establishment of trusts, it has been the settled doctrine that in equity the estate of the trustee shall not be subject to his specialty and judgment or attachment debts, which confer, at most, only a general lien, although it will be charged with a mortgage or other specific lien, made by him to secure a bona fide debt to a creditor without notice of the trust; nor is it subject to the dower or curtesy of the trustee's consort. The legal estate, save only in case of a purchaser for value and without notice, is exclusively for the benefit of cestui que trust.⁸⁹

§ 445. Same—Liability of Trustee's Estate to Escheat. The doctrine of the common law upon this point is not fully determined. The mere fact that the trustee is an alien seems to operate nothing, at least if the trust is a temporary one to provide for the payment of debts; but, when the trustee dies without heirs, it seems to be the better opinion that the lord took the land discharged of the trust.⁹⁰

But in this country, owing to the fact that no tenure exists, trust lands do not escheat to the state in such a case.⁹¹

§ 446. Same—Trustee's Duty, When Laboring under Disabilities, Difficulties or Doubts. Trusts being peculiarly the subject of equity cognizance, and the court of equity being charged with the supervision and control of their execution in all cases, the trust-

⁸⁷ 2 Min. Insts. 255; 2 Story, Eq. Jur. § 1268; Hughes v. Williams, 99 Va. 312, 38 S. E. 138.

⁸⁸ Armistead v. Hartt, 97 Va. 316, 33 S. E. 616.

⁸⁹ 2 Min. Insts. 235, 236; 2 Perry, Trusts, § 346; Gilbert, Uses, 16, note, 18 note.

⁹⁰ 2 Min. Insts. 236; Gilbert Uses, 10, 367, 445; Ferguson v. Franklin, 6 Munf. (Va.) 305.

⁹¹ 1 Spence, Eq. Jur. 500.

tee has always the privilege, and it is his duty, to appeal to that court in any case of doubt or difficulty for instructions; and in case of disabilities, it is competent in general to the Chancellor to supplement what may be wanting in the trustee, by the discretion and power of the court. Thus, if doubts arise as to the amount due under a deed of trust to secure debts, or as to the title to the property, of difficulties in respect to the relative priority of successive or conflicting incumbrances, or in relation to any other point connected with the trustee's duty, he ought not to proceed to carry the trust into execution save under the advice and sanction of the court of equity; and if he does not apply to the court, any one else interested may do so.⁹²

And so when the trustee, to whom the land was conveyed, declined to act, and by order of the court another was substituted who was insolvent, it was held that, at the instance of any party interested, a court of equity ought to compel the trustee to give bond and security duly to account for the proceeds of the property sold by him, and also to oblige the trustee to do his duty by selling in the manner calculated to get the best price, as by dividing it into parcels, to be sold separately.⁹³

§ 447. Same—Trustees Not to Employ Trust Estate for Private Advantage. It is a general principle of equity, no less than of conscience, that a trustee should not employ the property he holds in trust for his own private gain; but all profits accruing from such employment must be held to redound to the advantage of cestui que trust.⁹⁴

Hence, if the trustee compounds a debt due from the trust fund, or buys it for less than its nominal amount, the benefit accrues not to himself personally, but to the fund. And, whenever the trustee is chargeable with such an accession, he is also chargeable with interest thereon, just as, whenever he is liable for any loss sustained by the trust subject, he must in general account for interest on the amount. This interest is the legal rate, and in general it is simple interest. Compound interest, however, is allowed in cases of gross delinquency, as where the trustee has violated the express directions of a will, or where he will not disclose the profits he has made by his use of the trust funds. It has sometimes been said

⁹² 2 Min. Insts. 236; 2 Story, Eq. Jur. § 1267; *Hudson v. Barham*, 101 Va. 63, 43 S. E. 189, 99 Am. St. Rep. 849.

⁹³ 2 Min. Insts. 236, 237; *Terry v. Fitzgerald*, 32 Grat. (Va.) 847.

⁹⁴ 2 Min. Insts. 242 et seq.; *Lee v. Patillo*, 105 Va. 10, 52 S. E. 696; *Arnold v. Brown*, 21 Pick. (Mass.) 89, 35 Am. Dec. 296; *Jamison v. Glascock*, 29 Mo. 191; *Wiswall v. Stewart*, 32 Ala. 433, 70 Am. Dec. 549.

that where the profit omitted to be made by the trustee, or the losses incurred by him, consist of conjectural elements, such as rents and hires not realized, no interest is to be allowed thereon; but that doctrine, if it ever truly prevailed, is overruled, and interest is to be charged even on such estimated profits, whenever it was the duty of the trustee to have made them.⁹⁵

So a trustee cannot purchase the trust subject at his own sale, either for himself or as agent for another. The sale will be set aside at the beneficiary's instance, though the price obtained be fair, or the best to be had, and the trustee's motives pure.⁹⁶ But the trustee in such case is entitled to be reimbursed the purchase money paid by him, with interest, and also the value of permanent improvements, if any, and may hold the legal title to the property as security therefor, while, on the other hand, he is to be charged with the rents and profits accrued since the purchase.⁹⁷

§ 448. Same—Trustee's Obligation to Indemnify Cestui Que Trust for any Breach of Trust. The obligation to reimburse cestui que trust exists alike whether the loss is occasioned by a direct breach of trust or by the trustee's neglect or improper conduct; and it is worthy of notice that the demand against the trustee is in all cases a simple contract debt, unless he makes it otherwise by an acknowledgment under his seal.⁹⁸

Hence, if the trustee sell the property to an innocent purchaser, for value, or if he only conceal the misconduct of his co-trustee, equity (where alone cestui que trust's rights are in general protected) will constrain him to compensate cestui que trust for the loss thereby incurred.⁹⁹

A trustee, however, is only answerable for actual or constructive negligence, or for willful misconduct, so that he is not responsible for losses not occasioned by his own wrong or default. It would seem, therefore, that a clause, sometimes inserted in deeds creating trusts, exempting the trustee from liability for any loss or damage which does not arise from his default, is superfluous; and certain-

⁹⁵ 2 Min. Insts. 242, 243; 2 Story, Eq. Jur. §§ 1261, 1277; *Robinson v. Pett*, 2 White & Tud. Lead. Cas. Eq. 347, 348; *Rosser v. Depriest*, 5 Grat. (Va.) 6, 50 Am. Dec. 94.

⁹⁶ *Wasson v. English*, 13 Mo. 176; *Bresee v. Bradfield*, 99 Va. 331, 38 S. E. 196. It can only be set aside at the instance of the beneficiary. His creditors cannot demand it. *Bresee v. Bradfield*, supra.

⁹⁷ *Harrison v. Manson*, 95 Va. 593, 29 S. E. 420.

⁹⁸ 2 Min. Insts. 244; 2 Story, Eq. Jur. §§ 1268, 1285.

⁹⁹ 2 Min. Insts. 244; *Townley v. Sherborne*, 2 White & Tud. Lead. Cas. Eq. 292 et seq.

ly he would be answerable for damage growing out of his misconduct, even if there were an express stipulation to the contrary.¹

§ 449. **Same—Trustee's Duty to Preserve the Trust Property.** The trustee is to keep the trust property as he keeps his own, or rather as a man of ordinary prudence keeps his own. If, therefore, it be lost by a violent robbery or otherwise, without his own default or neglect, he is not chargeable. And where he acts by other hands, either from necessity, or conformably to common usage, he is not answerable for losses, if he exercises due care in selecting his agents. But it is to be observed that, if he places money in the hands of a banker, he should take care to keep it separate, and not mix it with his own in a common account, which last would be deemed treating the whole as his own, and would render him liable for any loss sustained by the banker's insolvency.²

§ 450. **Same—Trustee's Duty in Respect of Investments.** The trustee cannot safely invest in any other stocks or subjects than such as the court of equity has sanctioned by the usage of itself investing therein; nor in mere personal securities, however solvent they may appear to be. He must either secure the fund on real estate, or on some other thing of permanent value. Nay, more than this, in cases of personal securities taken by a trustee, he is made responsible for all deficiencies, and is also chargeable for all profits, if any are made. But this doctrine must be applied with some modification in times of political revolution, as during the late Civil War. A trustee or agent who acts within his powers, in good faith, in the exercise of a fair discretion, and in the same manner as he probably would have acted if the subject had been his own, ought not to be held responsible for any loss accruing in the management of the trust fund. Pre-eminent knowledge and uncommon foresight are not required, but only common skill, common prudence, and common caution.³

However, like all other fiduciaries, being, by the common law, allowed to demand the advice and instructions of the Court of Chancery, and being safe in acting under such instructions in whatever concerns his duty touching the trust (a doctrine which applies as well to the case of investments of the funds committed to him as in respect to other subjects), a trustee is very ill advised who, in all

¹ 2 Min. Insts. 244; *Townley v. Sherborne*, 2 White & Tud. Lead. Cas. Eq. 304 et seq.; *Taylor v. Benham*, 5 How. 233, 12 L. Ed. 130.

² 2 Min. Insts. 255, 256; 2 Story, Eq. Jur. §§ 1269, 1270; *Barton v. Ridgeway*, 92 Va. 162, 23 S. E. 226.

³ 2 Min. Insts. 256; 2 Story, Eq. Jur. §§ 1273, 1274; *Myers v. Zetelle*, 21 Grat. (Va.) 751 et seq. See *Dickinson's Appeal* (Mass.) 9 L. R. A. 279, note; *Knight v. Watts*, 26 W. Va. 175; *Key v. Hughes*, 32 W. Va. 184, 9 S. E. 77.

matters of importance which are attended with the least doubt or intricacy, does not invoke the direction of the court of equity, whereby he is exonerated from all responsibility, supposing that there is no collusion nor bad faith in the transaction.⁴

§ 451. **Same—Trustee Not to Receive Depreciated Currency, Nor Poor Security for Deferred Payments.** A fiduciary cannot be justified in receiving any depreciated currency, for a debt or demand payable in gold, except under peculiar circumstances, which have been enumerated thus:

- (1) When the necessities of the trust require it;
- (2) When it can be used to discharge, at par, lawful demands against the trust;
- (3) When the parties to whom the trust money is payable consent to receive it;

(4) When the security is of such doubtful availability that it is better to take the depreciated currency than the risk of total loss; and

(5) When authority to receive such currency has been conferred by the instrument creating the trust, and the trustee acts in good faith and with reasonable prudence.⁵

If the trustee has occasion to sell the trust property on credit, it is his duty to take security for the price, however wealthy the purchaser may be; and if he omit to do so, and the purchaser becomes insolvent, he is personally responsible for the amount.⁶

§ 452. **Same—Trustee's Duty as to Sales under Deed of Trust to Secure Debts.** In respect to such sales the trustee is the agent of both parties, and is bound, therefore, to disregard the suggestions of either inconsistent with that relation. He must also see to it that all impediments to the fair execution of the trust are removed, such, for instance, as may arise from a cloud resting on the title, which must prevent a fair and advantageous sale, from the uncertainty of the amount to be raised, or from the existence of previous incumbrances. In all cases of this kind it is his duty, as has been seen, before proceeding to sell, to solicit the aid of a court of equity to clear up the title, to ascertain the amount really due, or to remove whatever other impediments exist to the proper execution of the trust; and, if he fails to do it, it is the right of the debtor to stay his proceedings by injunction, until these objects can be effected.⁷

⁴ 2 Min. Insts. 256, 258; 2 Story, Eq. Jur. § 1273 et seq.; Whitehead v. Whitehead, 23 Grat. (Va.) 381; Taylor v. Benham, 5 How. 233, 12 L. Ed. 130; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619, 628.

⁵ 2 Min. Insts. 258.

⁶ 2 Min. Insts. 259; Miller v. Holcombe, 9 Grat. (Va.) 665.

⁷ Ante, § 446; 2 Min. Insts. 259.

There are other occasions, also, when the interposition of a court of equity is requisite to give effect to a deed of trust. Thus, where the trustee dies, the legal title descends to his heirs, whilst the trust was personal to himself; and the heirs, moreover, may be numerous, dispersed, and laboring under disabilities of infancy, coverture, etc.; and so where the trustee becomes a creditor under the deed of trust (in which case he becomes a mortgagee), either by the purchase of the debt secured by the deed or by being made the personal representative of the creditor; and, lastly, where the trustee refuses to perform the trust—in these, and other like cases, application is to be made to equity to cause the trust to be executed.⁸

There are states in this country in which, by statutory provisions, the discretion of the trustee for creditors is to a great extent controlled. Obviously the trustee is held to strict obedience of every statutory requirement.

§ 453. Joint Action of Several Trustees—Joint Sales and Joint Receipts. It is a fundamental principle that joint trustees have all equal power, interest and authority, and cannot act separately, but must all join, both in conveyance and in receipts.⁹

But where one trustee only receives and controls the money, without involving culpable negligence on the part of another, the mere fact of having formally united in the receipt does not subject the latter to liability. The doctrine as to receipts of coexecutors depends on the same general principle, but varied somewhat in its application, because coexecutors are not obliged to join, and the fact of their joining is therefore stronger *prima facie* evidence that the money was received by them jointly.¹⁰

§ 454. Trustee's Compensation. In England the established rule is to allow a trustee no remuneration for his personal trouble, unless in pursuance of fair stipulation. Trusts, says Lord Hardwicke, are looked upon "as honorary, and a burden upon the honor and conscience of the person entrusted, and not undertaken upon mercenary views; and there is a strong reason, too, against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress *cestui que trust*." ¹¹

⁸ 2 Min. Insts. 259; 1 Tucker, Com. 106.

⁹ 2 Min. Insts. 242; 2 Story, Eq. Jur. § 1280; Hill, Trustees, 305; Miller v. Holcombe, 9 Grat. (Va.) 672.

¹⁰ 2 Min. Insts. 242; Hill, Trustees, 312; 2 Story, Eq. Jur. § 1280; 1 Lom. Dig. 311; Brice v. Stokes, 11 Ves. 319; Townley v. Sherborne, Bridgm. 35, 2 White & Tud. Lead. Cas. Eq. 281 et seq., 304, 397; Miller v. Holcombe, 9 Grat. (Va.) 665.

¹¹ Ayliffe v. Murray, 2 Atk. 60; 2 Min. Insts. 245; 1 Perry, Trusts, § 432; 2 Perry, Trusts, § 916 et seq.

In the United States, the rule is different, and a reasonable compensation is with us allowed a trustee for his personal trouble, upon the scriptural and common-sense principle that "the laborer is worthy of his hire"; it being supposed that amongst us, however it may be in England, a diligent and faithful performance of duty on the part of trustees is more likely to be induced by giving a fair remuneration, than by making the function merely honorary.¹²

§ 455. Indemnification of Trustee by Cestui Que Trust. As to the allowance of the trustee's expenses incurred in the administration of the trust, the general rule is that such reasonable expenses as are actually incurred will be allowed him, provided his conduct has been unobjectionable.¹³

Apart from actual expenses incurred, whatever loss or damage may result to the trustee in the proper execution of the trust, cestui que trust must indemnify him for, and therefore the trustee is entitled to be reimbursed for all moneys honestly laid out with due discretion for the purpose of accomplishing the objects of the trust.¹⁴

§ 456. Purchase of Trust Subject by Trustee—General Doctrine. As a general principle, it is well settled that trustees, auctioneers, and all persons acting in a confidential character, are disqualified from purchasing the subject committed to them. The functions of buyer and seller are incompatible, and cannot be exercised by the same person, without great danger of fraud. Such transactions are constructively fraudulent, and are therefore voidable, at the instance of the beneficiary, although, if he chooses to recognize them, they are binding upon the trustee, etc.¹⁵

§ 457. Same—Qualifications of General Doctrine. It is admitted that a trustee can legally purchase the trust subject of a cestui que trust, who is sui juris and has discharged him from the relation of trustee, although even then the transaction will be scrutinized with guarded jealousy. So in like manner he may purchase when he has, from the beginning, disclaimed the trust and never acted in

¹² 2 Min. Insts. 245; Robinson v. Pett, 2 White & Tud. Lead. Cas. Eq. 353 et seq.

¹³ 2 Min. Insts. 245; 2 Perry, Trusts, § 910 et seq.; Robinson v. Pett, 2 White & Tud. Lead. Cas. Eq. 351; Southern R. Co. v. Glenn, 98 Va. 319, 320, 36 S. E. 395.

¹⁴ 2 Min. Insts. 245, 246.

¹⁵ Ante, § 424 et seq.; 2 Min. Insts. 246; 1 Perry, Trusts, § 194 et seq.; Bailey v. Robinson, 1 Grat. (Va.) 9, 10, 42 Am. Dec. 540; Marsh v. Whitmore, 21 Wall. 183, 184, 22 L. Ed. 482; Fox v. Mackreth, 1 White & Tud. Lead. Cas. Eq. 105, 126, et seq.

it. And, finally, a trustee may buy the trust subject by leave of the court of equity.¹⁶

§ 458. **Same—Measure of Relief Afforded to Cestui Que Trust.** Cestui que trust, if he wishes it, can insist upon a reconveyance of the estate from the trustee who purchased it, if it still remains in his hands, or from one who has purchased from him with notice; but it can be only on condition of cestui que trust repaying the purchase money, with interest, together with the sums expended in repairs and permanent improvements, the purchaser accounting for any deterioration proceeding from his acts, and also for rents and profits.¹⁷

But if cestui que trust does not desire a reconveyance he is entitled to have the property resold at public auction. For that purpose it is generally to be offered at what is called an upset price, at which the land is to be set up on a credit of six, twelve and eighteen months. If it brings no more than the upset price, the sale is confirmed. Otherwise, the sale to the trustee is vacated, and the proceeds of the new sale are applied, after paying the charges thereof, to reimburse the first purchaser the balance due him, and the residue is paid to cestui que trust.¹⁸

§ 459. **Same—Confirmation of Purchase by Cestui Que Trust.** The equity of cestui que trust is to have the option of confirming the purchase and holding the trustee to it, or of setting it aside and having the property resold, or of requiring the purchaser to reconvey to him upon reimbursing the trustee. If cestui que trust elects to confirm it deliberately, with full knowledge of the circumstances and of the effect of his conduct, neither he nor any one claiming under him can afterwards object to it. Nor can a stranger at any time object.¹⁹

§ 460. **Disclaimer of Trust by Trustee.** One cannot be obliged to act as trustee of a direct trust against his will. If the person named refuse to accept, a court of equity may appoint one, on the principle that "equity will not allow a trust to fail for want of a trustee."²⁰

§ 461. **Vacancy in Trusteeship, How Filled.** It is a general doctrine of equity that a trust shall never be permitted to fail for want

¹⁶ 2 Min. Insts. 246; *Fox v. Mackreth*, 1 White & Tud. Lead. Cas. Eq. 128; 2 Pomeroy, Eq. Jur. § 956 et seq., 1075.

¹⁷ 2 Min. Insts. 246; *Fox v. Mackreth*, 1 White & Tud. Lead. Cas. Eq. 135.

¹⁸ 2 Min. Insts. 246, 247; *Fox v. Mackreth*, 1 White & Tud. Lead. Cas. Eq. 135.

¹⁹ 2 Min. Insts. 247; *Marsh v. Whitmore*, 21 Wall. 183, 22 L. Ed. 482.

²⁰ *Trask v. Donoghue*, 1 Aik. 373; *Hill, Trust*, 225; *Story, Eq. Jur.* § 1061.

of a trustee, and therefore equity will supply a trustee, whenever the needs of the trust require it, upon a proper bill filed for the purpose.²¹

§ 462. Precatory or Recommendatory Trusts. These arise by implication, or construction of the court of equity, from mere words of recommendation, hope, or entreaty, contained in wills, being founded on that cardinal rule in the construction of wills that the testator's intent, when ascertained, is to be carried out, by whatever words conveyed. Thus, if the testator recommends, or requests, or expresses a hope, or declares that he has no doubt, that such and such a disposition of his estate, or any part of it, will be made, if the objects contemplated and the subjects given are certain, the words are considered imperative, and create a trust, unless it clearly appears that his expressed recommendation, etc., is to be controlled by the party expected to carry it into effect, and that he has an option to defeat it. Hence, if it be the intent that the person to whom the property is given shall take it, not beneficially, but only to carry into effect the expressed wish or recommendation, even if the object fails, or is contrary to the policy of the law, or is too vaguely worded to be carried into execution, yet the necessary legal consequence is that there is a resulting trust for the testator's next of kin.²²

There has been considerable fluctuation of judicial opinion of late years as to the doctrine of implying a trust from words of recommendation, entreaty, hope, etc.²³

According to Mr. Hill's text, the decided tendency of the modern authorities is to give the words of recommendation, etc., their natural and ordinary effect, unless it be clear that they are intended to be used in a peremptory sense. And the former American editors of the work, Messrs. Troubat and Wharton, express the opinion that such was the drift of the more recent English decisions, and that the result of the American and English adjudications, at the date of their note, was expressed in an Alabama case, that it was the "true rule of interpretation to give such recommendatory expressions their natural and ordinary and familiar sense, and, having arrived at the true intention of the testator, to let that intention, if lawful, be the rule of decision in the particular case."²⁴

²¹ 2 Min. Insts. 247 et seq.; 1 Story, Eq. Jur. §§ 1287, 1059.

²² 2 Min. Insts. 250; 2 Story, Eq. Jur. § 1068 et seq.; 1 Perry, Trusts, § 112 et seq.; 2 Roper, Legacies, 1417 et seq.; *Harrison v. Harrison*, 2 Grat. (Va.) 14, 44 Am. Dec. 377.

²³ 2 Min. Insts. 250; Hill, Trustees, 110 et seq., 112, note 2.

²⁴ Hill, Trustees, 112 note 2, 115; 2 Min. Insts. 251; *Ellis v. Ellis*, 15 Ala. 296, 50 Am. Dec. 132.

Mr. Bispham, the editor of the fourth American edition of the work in question, conceives that the current of the latest English decisions seem rather in favor of construing words of recommendation to create a trust, and submits the following rules as the result:

"1. Precatory words in a will, equally with direct fiduciary expressions, will create a trust. The wish of a testator, like the request of a sovereign, is equivalent to a command.

"2. Discretionary expressions, which leave the application or nonapplication of the subject of the devise to the objects contemplated by the testator entirely to the caprice of the devisee, will prevent a trust from attaching; but a mere discretion in regard to the method of application of the subject, or the selection of the object, will not be inconsistent with a trust.

"3. Precatory words will not be construed to confer an absolute gift on the first taker, merely because of failure or uncertainty in the object or subject of the devise.

"4. But failure or uncertainty will be an element to guide the court in construing words of doubtful significance adversely to a trust."²⁵

§ 463. Vague and Indefinite Trusts—Void in General. In order that a court of equity may carry trusts into effect, they must be certain and definite in respect to the objects or persons who are to take, and also in respect to the subject matter thereof. Where they are vague and indefinite in either of these particulars, therefore, they are void, and consequently a trust results to the donor. A gift of £2,000, to be by the donee distributed amongst those of the donor's family whom she should deem the most deserving, is void for vagueness of the person or object; and so, also, is a gift of the residue of the testator's estate to the executors for such uses and purposes as they shall think fit. So in case of a bequest of all the residue of the personal estate to the testator's wife, what is left at her death to go to his two grandchildren, the general rule is that the latter disposition is void for repugnance to the first interest created, and also for the uncertainty of the property to which it shall attach, as what is left depends on the wife's uncontrolled will, so that the wife takes not for her life only, but in fee simple.²⁶

A general description of the persons by classes may often be as sufficient a designation as to name them individually, as "sons,"

²⁵ Hill, Trust. 116, note 2; 2 Min. Insts. 251.

²⁶ 2 Min. Insts. 251, 252; 2 Story, Eq. Jur. §§ 989a, 1073; 2 Redfield, Wills, 408 et seq.; *Stubbs v. Sargon*, 3 My. & Cr. 513, 514; *May v. Joynes*, 20 Grat. (Va.) 692; ante, § —.

"children," etc., and even "family" and "relations," where the context fixes clearly the particular persons who are to take.²⁷

A trust which, without an act of the Legislature, would be illegal, may by such an act be rendered valid, supposing the creator of the trust, whether by deed or will, to have contemplated the obtaining of such an act, and have limited the time for its enactment, so as not to transcend the period prescribed by law (in order to prevent perpetuities) for the taking effect of all future contingent limitations, namely, a life or lives in being, and in some instances the time of gestation (from nine to ten months) and twenty-one years afterwards.²⁸

§ 464. **Same—Charitable and Religious Trusts.** The trusts most frequently obnoxious to the objection of uncertainty and indefiniteness are those for charitable purposes, where it often happens that both the person, or beneficiary, and the object, or design, are so vaguely described as to render it impossible to give effect satisfactorily to the contemplated disposition of the property. The uncertainty of the beneficiary has in many cases arisen from the fact that the intended object of benefit is an unincorporated association, having no legal existence, such as a religious congregation or other voluntary society. Thus, a trust in favor of "the Baptist Association that for common meets at Philadelphia," of "needy, poor and respectable widows," of "the Roman Catholic congregation residing in Richmond," of "the trade of the town of Alexandria," are all void; the first three because the persons designed to be benefited are unascertained, and the last because the purpose and design are uncertain.²⁹

It would seem that, at common law, somewhat more of uncertainty was tolerated in charities than in gifts to individuals; but in that respect the common law was greatly aided by the statute 43 Eliz. c. 4. Indeed, it was formerly supposed that the indulgence shown to vague charities arose mainly, if not wholly, out of the statute 43 Eliz.; nor was the general judicial mind of England and America disabused of that impression until the discovery and publication by the record commissioners of the "proceedings in chancery," as contained in the ancient records deposited in the Tower of London.

²⁷ 2 Min. Insts. 252; 2 Story, Eq. Jur. § 1071; 1 Roper, Legacies, 30 et seq.

²⁸ 2 Min. Insts. 252, 253; post, § 696; *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Pet. 99, 7 L. Ed. 617; *Literary Fund v. Dawson*, 10 Leigh (Va.) 147. See *Fellows v. Miner*, 119 Mass. 541.

²⁹ 2 Min. Insts. 252; *Philadelphia Baptist Ass'n v. Hart*, 4 Wheat. 1, 4 L. Ed. 499; *Gallego v. Attorney General*, 3 Leigh (Va.) 450, 461, 462, 24 Am. Dec. 650; *Wheeler v. Smith*, 9 How. 80, 13 L. Ed. 44.

Many cases occur in these proceedings anterior to 43 Eliz., where uncertain charities were enforced in chancery. It was therefore considered in *Vidal v. Girard*,³⁰ that by the common law cases of charities, although general and indefinite, were familiarly known to and enforced in equity.³¹

It may be added, in conclusion, that if a number of persons subscribe to a valid charitable trust, as soon as they have subscribed, their right and interest in their subscriptions are completely divested; and they cannot be heard in a court of equity to complain, though the trustees be guilty of gross misfeasance and fraud. The Attorney General, or the trustees or the beneficiaries of the charity, may complain, but not the subscribers as such.³²

§ 465. **Local Jurisdiction over Trusts.** The jurisdiction of courts of equity over trusts, as well as other things, is not confined to cases where the subject-matter is within the absolute reach of the process of the court. If the proper parties can be reached by the court's process, it will be sufficient to justify the assertion of full jurisdiction over the subject. The court acts primarily in personam, and only collaterally in rem; but the possession of either the person or the subject will, for the most part, enable it to administer complete justice. There are, however, some qualifications to this general doctrine. If the person is in the power of the court, any decree may be made which that party can personally perform, e. g., to convey land though in another jurisdiction, or to render an account of its profits, etc.; but it is not competent to the court to decree, touching the foreign subject, what can only be done by an authority operating territorially, where the subject is, e. g., a partition of lands abroad, as between joint tenants, or co-heirs, or a sale thereof.³³

³⁰ 2 How. 196, 11 L. Ed. 205.

³¹ 2 Min. Insts. 252.

³² *Clark v. Oliver*, 91 Va. 421, 22 S. E. 175.

³³ 2 Min. Insts. 254; 2 Story. Eq. Jur. § 1290 et seq., 1298, 743, 744; *Arglesse v. Muschamp*, 1 Vern. 75; *Penn v. Baltimore*, 1 Ves. Sr. 444; *Massie v. Watts*, 6 Cr. 158 et seq.; *Roller v. Murray*, 107 Va. 546, 59 S. E. 421; *Mead v. Merritt*, 2 Paige (N. Y.) 404; *Ward v. Arredondo*, 1 Hopk. Ch. (N. Y.) 213, 14 Am. Dec. 545.

CHAPTER XXII.

CONDITIONS.

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§ 466. **Nature of Conditions.** A condition is a qualification annexed to any estate, whereby it is to arise (in which case it is called a condition precedent; i. e., precedent to the arising of the estate), or is to be defeated (when it is styled a condition subsequent; i. e., subsequent to the arising of the estate).¹

It must be created and annexed to the estate at the time the latter is made, and not afterwards, and is usually contained in the same instrument as that which creates the estate, although it may be

¹ 2 Min. Insts. 261; 2 Th. Co. Lit. 2; Bac. Abr. Conditions.

contained in a separate instrument, if sealed and delivered at the same time with the principal deed. If contained in a different instrument, however, it is usually, and more properly, denominated a defeasance.²

Conditions may be annexed to estates of every quantity or duration, whether in fee simple, for life or for years.³

§ 467. **Implied Conditions.** Where the law annexes to certain acts of the owner of land, as a penalty therefor, the consequence of forfeiture of the land, he holds the land upon the implied condition that he will not do the acts in question.

Even in case of the fee simple, there were at common law instances of forfeitures of this kind, as in the case of an attainer of treason or felony.⁴ But these forfeitures, as applied to the fee simple, are in the main things of the past.

In the case of estates less than the fee simple, however, as estates for life or for years, there were at common law several instances wherein such forfeitures accrued, not to the state, but to the reversioner or remainderman, by reason of acts of the tenant especially calculated to prejudice the former's interests.

It is said by Mr. Fearné that "forfeiture (by breach of these conditions) is one of the regular modes of determination incident to an estate for life (or years), and to which its nature is subject in its original limitation."⁵ And hence a remainder (which cannot be limited in derogation of the preceding estate, but must await its regular termination)⁶ may be limited after such a termination of an estate for life or years.⁷ This is due to the fact that, when the reversioner or remainderman enters for a breach of such implied condition, it is a rule of the common law that he is seised under, and not paramount to, the defaulting tenant, and hence subject to all lawful charges, incumbrances or liens imposed upon such tenant's estate in the premises. The reversioner or remainderman takes, as it were, by purchase from the tenant.⁸

The first of these implied conditions annexed by the common law to estates in fee tail, for life or for years is that the tenant shall not attempt by tortious conveyance (feoffment with livery, fine or com-

² 2 Min. Insts. 261; 2 Th. Co. Lit. 122, 123, note (P, 3); 2 Bl. Com. 151, note (2). See post, 995.

³ 2 Min. Insts. 273; 2 Bl. Com. 152.

⁴ 2 Min. Insts. 589; 4 Bl. Com. 381, 385; 4 Stephen, Com. 447, 450.

⁵ Fearné, Cont. Rem. 16; 2 Min. Insts. 263.

⁶ Post, §§ 592, 650.

⁷ 2 Min. Insts. 173, 263, 390, et seq.; Fearné, Cont. Rem. 16, 217; Duncomb v. Duncomb, 3 Lev. 437; Hooker v. Hooker, Rep. temp. Hardw. 17.

⁸ 2 Min. Insts. 268, 275, 276; 1 Th. Co. Lit. 469; 2 Th. Co. Lit. 117.

mon recovery) to convey a greater estate than he has a right to convey.⁹

At common law such a tortious conveyance converted the reversioner's or remainderman's right of entry, when the particular estate should come to an end, into a mere right of action, and for that reason, as being injurious to the reversioner or remainderman, was esteemed a violation of the implied condition annexed to the estate, and so produced a forfeiture, for which the reversioner or remainderman might enter immediately.¹⁰

In this country it is otherwise. No conveyance can pass more than the grantor has a right to convey, and therefore, since no conveyance can in this particular prejudice the reversioner or remainderman, it is justly concluded that no forfeiture ensues.¹¹

The other two conditions annexed by the common law to particular estates for life or years are: (1) That the tenant shall not claim in a court of record a greater estate than he is entitled to;¹² and (2) that he shall not disclaim in a court of record to hold of his landlord.¹³

§ 468. Express Conditions—Conditions Precedent. An estate on condition expressed in the grant itself is where an estate is granted either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged (which is essentially the commencement of a new estate), or be defeated upon performance or breach of such qualification or condition, instances of which most frequently arising in practice are those contained in leases for years, providing for the lessor's re-entry in case of a breach of any of the covenants of the lease, as by nonpayment of rent, by failing to repair, by assignment, etc., or in case of the lessee's becoming bankrupt.¹⁴

The nature of conditions precedent has been explained. It is an invariable principle of the common law that they must in all cases be performed or complied with before the estate can vest. If, there-

⁹ Ante, §§ 196, 329; 2 Min. Insts. 111, 263.

¹⁰ Ante, §§ 196, 329; 2 Min. Insts. 111, 263; 2 Bl. Com. 274.

¹¹ 2 Min. Insts. 111, 263; 1 Lom. Dig. 458.

¹² Ante, § 197; 2 Min. Insts. 112, 264; 2 Bl. Com. 276; 1 Lom. Dig. 593, 821. But see 1 Washburn, Real Prop. 91; 4 Kent, Com. 427.

¹³ Ante, § 198; 2 Min. Insts. 112, 264; 2 Bl. Com. 275. See *Willison v. Watkins*, 3 Pet. 47, 7 L. Ed. 596; *Walden v. Bodley*, 14 Pet. 162, 10 L. Ed. 398; *Merryman v. Bourne*, 9 Wall. 601, 19 L. Ed. 683; *Emerick v. Tavener*, 9 Grat. (Va.) 226, 58 Am. Dec. 217; *Jackson v. Wheeler*, 6 Johns. (N. Y.) 272; *Jackson v. French*, 3 Wend. (N. Y.) 339, 20 Am. Dec. 699. But see 1 Washburn, Real Prop. 91.

¹⁴ 2 Min. Insts. 264, 265; 2 Bl. Com. 154, note (5); *Duppa v. Mayo*, Wm. Saund. 287 et seq., notes (16), (u).

fore, the condition be or become impossible, although by the act of God, or of the grantor himself, yet no estate shall arise. And so, if the condition be illegal, even though it be complied with, no estate will arise, the law being concerned to offer no encouragement to the violation of its policy. But of this more will be seen hereafter.¹⁵

§ 469. **Same—Conditions Subsequent.** A condition subsequent is one which is to be performed or fulfilled after the vesting of the estate, and the intent of which is to defeat it. Thus, if A. leases land to W. for twenty years, on condition that (or “provided that” or “so that,” etc.) W. pay an annual rent of £100 during the term, this is a condition subsequent to the vesting of W.’s estate, and, if it be not observed, will go to defeat it. It should be observed that, because the effect of conditions subsequent is to defeat estates, they are to be construed strictly, whilst conditions precedent, which are to create estates, are to receive a liberal construction; and if performed substantially, and as near to the intent as possible, it will be sufficient.¹⁶

The reason thus assigned by the text-writers for this diversity in the construction of conditions precedent and subsequent, respectively, is not altogether satisfactory; and it has been suggested that a better reason is the general principle of construction that the words of the grantor are always to be construed most favorably to the grantee.¹⁷

Thus, if it be doubtful whether a clause in a deed should be construed to be a covenant or a condition subsequent, the courts will incline to hold it a covenant.¹⁸

§ 470. **Construction of Conditions.** There are no precise technical words in wills, nor even in deeds, to make a stipulation a condition precedent or subsequent; neither does it depend on the prior or posterior collocation of the clause. It is to be construed according to the intention, as gathered from the whole instrument. If the thing is to happen before the estate is to vest, it is a condition precedent; if after, it is a condition subsequent. Thus, if an estate be limited to A. on condition that he marry Z., the marriage is a precedent condition, and till that takes place no estate is vested in A.

¹⁵ 2 Min. Insts. 265; 2 Th. Co. Lit. 18, 22, 23, note (N); 2 Bl. Com. 154. See *Wiswell v. Bresnahan*, 84 Me. 397, 24 Atl. 885.

¹⁶ 2 Min. Insts. 266; 2 Th. Co. Lit. 1, note (A), 4, 5, 58. See *Burdis v. Burdis*, 96 Va. 81, 30 S. E. 462, 70 Am. St. Rep. 829, note; *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547.

¹⁷ 2 Min. Insts. 267.

¹⁸ *King v. Norfolk & Western R. Co.*, 99 Va. 625, 39 S. E. 701.

Or if A. grant W. land for a term of two years, upon condition that, if he pay the lessor within two years \$400, he shall have the fee, this also is a condition precedent, and the fee simple passeth not till the \$400 be paid. On the other hand, if A. grant W. certain land in fee upon condition that W. and his heirs pay yearly therefor a rent of \$100 forever, that is a condition subsequent. The estate vests in W. immediately, subject to be defeated if the rent be not paid.¹⁹

The general rule on this subject seems to be that if the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, if the act may, consistently with the intent of the instrument creating the estate, be done after as well as before the vesting of the interest, or if from the nature of the act to be performed and the time required for its performance, or other circumstances, it is the evident intention of the parties that the estate shall vest first and the grantee perform the act after taking possession, then the condition is subsequent.²⁰

Express conditions are created by such words as "on condition," "provided that," "so that," etc., which of themselves may make a condition, and by other less direct phrases, such as "if it happen," and many others, which do not of themselves constitute a condition, without a clause of re-entry, or other words of explanation, without which, indeed, the sentence is incomplete.²¹

Thus a "grant to A. and his heirs, on condition that (or provided that, or so that) he pay annually on Christmas day a rent of \$500," is a complete condition, and upon failure to pay, the grantor or his heirs may re-enter. But with the last-mentioned class of words (if it happen, etc.), words authorizing a re-entry, or at least some words to complete the sentence, are needed to make a condition. Indeed, those, or some corresponding words, are required in order to complete the sense in any manner. A grant "to B. in fee, reserving an annual rent of \$500, payable at Christmas, but if it happen the aforesaid rent be not paid," conveys no complete meaning, until some other words are added, such as "that then it shall be lawful for the grantor or his heirs to re-enter," etc.²²

§ 471. Effect of Compliance with Condition. The effect of compliance with a condition is that thenceforth the condition is gone and the thing to which it is annexed becomes absolute and unconditional. The thing which thus becomes absolute is sometimes the

¹⁹ 2 Min. Insts. 265, 266; 2 Th. Co. Lit. 19, note (K), 10, 4; 2 Bl. Com. 154 note (6); 1 Washburn, Real Prop. 446.

²⁰ 1 Washburn, Real Prop. 446; *Burdiss v. Burdis*, 96 Va. 81, 30 S. E. 462, 70 Am. St. Rep. 825, and note.

²¹ 2 Min. Insts. 265, 272; 2 Bl. Com. 151, note (2); 2 Th. Co. Lit. 4 et seq.

²² 2 Min. Insts. 267; 2 Th. Co. Lit. 5, 6, 44.

grantee's estate and sometimes the grantor's right of re-entry thereon, depending upon the way in which the condition is framed.²³

If the condition is precedent, it is always the grantee's estate that becomes absolute upon compliance therewith; if it be subsequent, it may be the grantee's estate or the grantor's right of re-entry, according to circumstances.²⁴

Thus, upon a grant of Blackacre "to A. in fee, on condition that he first pay Z. \$1,000," as soon as A. pays the money A.'s estate is absolute (a condition precedent). And upon a grant of Blackacre "to A. in fee, provided that the grantee pay the grantor \$1,000 within one year" (a condition subsequent annexed to A.'s estate), if A. pays the sum within one year his estate is absolute and unconditional. But upon a grant of Blackacre "to A. in fee, but if the grantor pays \$1,000 to A. within one year, A.'s estate to cease and determine" (a condition subsequent annexed to the grantor's right of re-entry upon the land—such is the form of the ordinary mortgage), and the grantor pays the money, it is the grantor's right of re-entry that becomes absolute and unconditional.²⁵

§ 472. Effect of Noncompliance with the Condition—I. General Doctrine. The effect of a noncompliance with the stipulated condition will be examined with reference to (1) the general doctrine; and (2) the grantor's re-entry for breach of the condition.

The general doctrine is that, if the condition is a condition precedent and is not complied with, the estate cannot arise.²⁶ If it is a condition subsequent, and is to be performed by the grantor, and is not complied with, the grantee's estate is absolute, but where it is to be performed by the grantee, and is not complied with, the grantee's estate is in general terminated—at least in a court of law—and the grantor's right of re-entry becomes absolute.²⁷

§ 473. II. Grantor's Re-Entry for Breach of Express Condition Subsequent—Discussion Outlined. It is an established rule of the common law that, if the conditional estate be a freehold, the mere occurrence of the event which constitutes the violation of the condition does not defeat the estate, because, as a freehold can at common law only be created by the notoriety of livery of seisin, there is needed a corresponding notoriety in order to determine it. This corresponding notoriety is the re-entry of the grantor, or his heirs, supposing the grant to be a private one; but when the grant is a

²³ 2 Min. Insts. 295.

²⁴ 2 Min. Insts. 295; 2 Th. Co. Lit. 60, note (O, 1).

²⁵ 2 Min. Insts. 295.

²⁶ This is subject to a slight qualification in the case of conditions in restraint of marriage annexed to legacies, which will be considered hereafter. Post, § 512 et seq.; 2 Min. Insts. 286.

²⁷ 2 Min. Insts. 295.

public grant, it is by a judicial inquiry, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging the legal consequence.²⁸

If the estate be only for years it is otherwise. No actual entry (unless it be so stipulated) is necessary to determine it; for, as a term for years may begin without ceremony, so it may end without ceremony.²⁹

§ 474. **Same—1. Effect of Grantor's Re-Entry, When Made.** Re-entry, in the case of conditions express, invests the grantor or his heirs with their original estate, and therefore defeats all rights and incidents annexed to the estate which is determined by the re-entry, such as dower and curtesy, and all charges and incumbrances created by the grantee during his possession; for upon the re-entry of the grantor, he becomes seised of an estate paramount to that which was liable to those charges. But in the case of conditions implied, as we have seen, the grantor or his heirs, upon re-entry, claim under, and not paramount to, the grantee, and consequently none of the latter's charges and incumbrances are avoided by the re-entry, but the grantor or his heirs (or the remainderman) take subject to them.³⁰

The re-entry for breach of express condition destroys as well the subsequent limitation (if any) as it does the immediate estate on which the entry is made; for else the grantor or his heirs, who thus re-enter, could not be seised as before the grant. Hence there was no device at common law whereby an estate of freehold, once vested, could be defeated—that is, determined before its regular expiration—and the land be shifted to a stranger; for, as a remainder, the limitation to the stranger was void, being in derogation of the preceding estate, and, as a consequence of the condition, it was void, because no one but the grantor or his heirs could enter for the condition broken, and that entry unavoidably defeated the subsequent limitation, as well as the preceding estate. But here again is to be noted the distinction just adverted to between conditions express and conditions implied. Upon the basis of that distinction, it seems a remainder may be limited to take effect upon the determination of the preceding particular estate by the latter class of conditions.³¹

²⁸ 2 Min. Insts. 267; 2 Bl. Com. 155; 2 Th. Co. Lit. 3, 87, 95, et seq.; *United States v. De Repentigny*, 5 Wall. 267, 18 L. Ed. 627; *Schulenberg v. Hariman*, 21 Wall. 63, 22 L. Ed. 551; *Lampet's Case*, 10 Co. 48b; *Pennant's Case*, 3 Co. 65a.

²⁹ 2 Min. Insts. 267.

³⁰ 2 Min. Insts. 267, 275; 2 Th. Co. Lit. 97, 99, note (W, 2), 117; 1 Th. Co. Lit. 469; *Bac. Abr. Conditions* (O), 4.

³¹ 2 Min. Insts. 268, 263, 172; ante, § 467; 2 Th. Co. Lit. 99, note (W, 2), 768, *Butler's note II*.

§ 475. **Same—2. To Whom Right of Re-Entry to be Originally Reserved.** The law is rigorous, even to-day, in demanding that the right of re-entry must be reserved by the terms of the conveyance to the grantor or lessor or his heirs (or in the case of personalty, to the grantor or his personal representatives), and to none else; "and the reason hereof," says Lord Coke, "is for the avoiding of maintenance, oppression of right, and stirring up of suits, and therefore nothing in action, entry, or re-entry, can be granted over, for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth."³²

On the other hand, it seems that the heir of the grantor is entitled to re-enter for breach of a condition, though he be not specially named.³³ At common law, therefore, if the grantor or his heirs do not take advantage of a breach of condition, no one else can.³⁴

In equity, however, a condition intended for the benefit of a third person will often be regarded as a trust, and be enforced in his favor as a charge upon the land, or upon the person holding the land, to which it is attached. Thus, a father having conveyed lands to his son, on condition that he should pay his debts, a court of equity, at the instance of the creditors, will charge the debts as a trust on the lands in the hands of the grantee, or of the father's heir, if he has entered for the breach.³⁵

So where A. conveyed parcels of land to sundry persons at different times, but inserted in the deed to each a similar condition against the use of the land for certain trades, it was held that, though for a breach by one of the grantees no other grantee could have an action at law against him to enforce the condition, equity would enforce a performance of it in favor of a grantee injured thereby.³⁶

§ 476. **Same—3. Right of Re-Entry as Passing with the Reversion.** For a like reason as in the preceding case, namely, to prevent litigation and the stirring up of suits, the assignee of the reversion

³² 2 Th. Co. Lit. 84; 2 Min. Insts. 273, 274. But see *McKissick v. Pickle*, 16 Pa. 140.

³³ *Jackson v. Topping*, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; *Thomas v. Record*, 47 Me. 500, 74 Am. Dec. 500; *Bowen v. Bowen*, 18 Conn. 535. But see *Sheppard's Touchstone*, 133.

³⁴ 2 Min. Insts. 279; *Schulenberg v. Harriman*, 21 Wall. 63, 22 L. Ed. 551; *Norris v. Milner*, 20 Ga. 563; *Smith v. Brannan*, 13 Cal. 107.

³⁵ 2 Min. Insts. 274; *Jackson v. Topping*, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; *Dumpor's Case*, 4 Co. 119b, 1 Smith, Lead. Cas. 91; *Vanmeter v. Vanmeter*, 3 Grat. (Va.) 148; *Crawford v. Patterson*, 11 Grat. (Va.) 364.

³⁶ *Barrow v. Richard*, 8 Paige (N. Y.) 351, 35 Am. Dec. 713. See *Collins Mfg. Co. v. Marcy*, 25 Conn. 242.

cannot, at common law, re-enter upon the land, although he was allowed to distrain for the rent, which was deemed an incident to the reversion. Upon the dissolution of the monasteries by Henry VIII, most of their lands having been let on leases, with conditions and stipulations secured by clauses of re-entry, this principle gave rise to much trouble. The king and other assignees of the monastery lands could not enforce by re-entry the conditions and stipulations set forth in the leases, nor could the tenants enforce against the assignees the covenants in their favor.³⁷

Provision to meet the case was made by 31 Hen. VIII, c. 13, which gave the king all advantage, whether of covenants, conditions, or the like, as the lessor would have had; and by statute 32 Hen. VIII, c. 34, this was extended to the grantees of the king, and, further, to make this equitable remedy universal, mutual redress was given in all cases of landlord and tenant, where the former granted his reversion to another.³⁸

§ 477. Same—4. Assignment of Right of Re-Entry Independently of the Reversion. While the statutes just referred to provide for the exercise of the right of re-entry for breach of condition by and against the assignee of the reversion, they do not authorize, nor did the common law, the assignment of the mere right of re-entry without the reversion.

On the contrary, the common law prohibited the assignment of mere rights of entry upon land even more strenuously than it did such assignments when accompanying the assignment of the reversion, and for the same reason as applied in that case and in the case of the assignments of choses in action, namely, lest it should enable the great men of large social and political influence to obtain pretended titles, whereby justice might be trodden down and the weak oppressed.³⁹ And this prohibition of the common law was in England emphasized by the passage of the statute 32 Hen. VIII, c. 9, known as the "statute of pretended titles" (that is, pretended titles) whereby persons were prohibited to convey or take, or to bargain to convey or take, any pretended title to lands or tenements, unless the grantor, or those under whom he claimed, shall have been in possession of the same, or of the reversion or remainder thereof, one whole year next before.⁴⁰

§ 478. Same—5. Modes of Making Re-Entry. At common law, the grantor or his heirs are bound to enter for the condition broken,

³⁷ 2 Min. Insts. 274; 2 Th. Co. Lit. 85 et seq., 89 et seq.

³⁸ 2 Min. Insts. 274, 275; 2 Th. Co. Lit. 89, note (M, 2); 3 Reeves, Hist. Eng. Law, 234.

³⁹ 2 Min. Insts. 640; 2 Bl. Com. 290, note (6).

⁴⁰ 2 Min. Insts. 641.

in order to revest the estate, and until such entry no action was originally maintainable to recover the land; the right of possession and the right of property still continuing uninterrupted in the grantee. Hence it is not properly called a right, but a title of entry in the grantor.⁴¹

But whilst this doctrine was never seriously questioned, the modern decisions relieve the grantor from the burden of making an actual entry by holding to be sufficient for the purpose the constructive one implied in an action of ejectment, wherein the tenant, under the old consent rule, confessed the lease, entry and ouster supposed. Even where the estate to be avoided is a freehold, such constructive entry is held to be sufficient.⁴²

And since the action of ejectment has assumed a statutory form, by which all "fictitious scaffolding" has been dispensed with, it is generally held, not only in this country, but in England, that the bringing of the action is equivalent to an entry.⁴³

§ 479. Condition Subsequent Distinguished from Condition in Law, or Common-Law (or Special) Limitation. By condition in law, in the ordinary use of language, would be meant conditions implied by law, which have been already treated of.⁴⁴ The conditions in the cases there mentioned are naturally and properly said to be implied, or tacitly annexed to the estates to which they belong; but in the instance now under consideration no condition can, without some violence, be considered as implied or tacitly annexed, and it tends to confusion of thought to treat it as a condition at all. The case contemplated is where an estate is limited to one until a certain event happens, or whilst a certain state of things continues, or during an indeterminate period. Hence, although it is Littleton who denominates it a condition in law, it is deemed a more correct designation to style it a limitation, for which there is much sanction of authority.⁴⁵ We shall hereafter designate it a common-law limitation or a special limitation, in order to differentiate it from the conditional limitation, of which we shall hear much later on.

Common-law or special limitations are created by such words as "while," "during," "as long as," "until," etc. Thus, a grant to A.

⁴¹ 2 Min. Insts. 276; 2 Th. Co. Lit. 95; 3 Th. Co. Lit. 59, 60, note (D, 1); Gilbert, Ten. 26.

⁴² 2 Min. Insts. 276; Little v. Heaton, 2 Ld. Rayn. 750; Goodright v. Carter, 3 Dougl. 477; Doe v. Masters, 2 B. & Cr. 490.

⁴³ 2 Reeves, Real Prop. § 719; Schlesinger v. Kansas City & S. R. Co., 152 U. S. 444, 14 Sup. Ct. 647, 38 L. Ed. 507; Jones v. Carter, 15 M. & W. 718.

⁴⁴ Ante, § 467.

⁴⁵ 2 Min. Insts. 268; 2 Bl. Com. 155; 2 Th. Co. Lit. 87, note (L, 2), 120 et seq.

until Z. returns from abroad; to a woman while she remains a widow, or during widowhood (*durante viduitate*); to D. and his heirs as long as Y. has heirs of the body (a fee qualified)—all these are special limitations, and not conditions subsequent.⁴⁶

Limitations differ from conditions in this: A limitation marks the utmost time of continuance of an estate; a condition marks some event, which, if it happens in the course of that time, is to defeat the estate. Thus, in case of a grant to Z. until W. is married, the estate may endure until that event, but no longer, and then it terminates of itself, without any entry on the part of the grantor or his heirs; and the words appointing this to be the time of continuance are called the limitation, from their ascertaining the boundary of the estate. But if the grant were to Z. for life, provided that, if W. married, Z.'s estate should cease, Z.'s freehold is not prematurely determined before his death by the mere occurrence of W.'s marriage; but there must be, as we have seen, also an entry by the grantor or his heirs, in order to defeat Z.'s estate. It is manifest, therefore, that whilst there can be no limitation over in the last case of the condition, in the case of the limitation, a remainder may be limited to take effect after the first estate comes to an end. That is, a grant to Z. until W. is married, with remainder to R., is good; but a grant to Z. for life, provided that, if W. marry, Z.'s estate shall cease and be void, and then remainder to R., is of no effect in respect of R.'s remainder, which will be defeated by the entry of the grantor or his heirs, in order to determine Z.'s estate.⁴⁷

§ 480. Condition Subsequent Distinguished from Conditional Limitation. A conditional limitation is a future estate of freehold vested in one person, but so limited that it may shift over to another immediately upon the happening of some contingent event, without awaiting the regular expiration of the first estate, and can only arise under the statutes of uses and of wills, by reason of their doing away with the common-law necessity for the notoriety of livery of seisin to create a freehold, and their dispensing with the corresponding notoriety of entry to terminate it prematurely upon the happening of a contingency;⁴⁸ whereas an estate upon condition subsequent is liable like the other to terminate prematurely, but in that event does not go over to another, but returns to the grantor, etc., upon his re-entry.

Such limitation partakes of the nature both of an estate on condition and a remainder, the first estate, even though an estate of free-

⁴⁶ 2 Min. Insts. 269; 2 Bl. Com. 155, 156; 2 Th. Co. Lit. 87, note (L, 2).

⁴⁷ 2 Min. Insts. 269; 2 Th. Co. Lit. 87, note (L, 2).

⁴⁸ Post, § 680; ante, § 474: 2 Min. Insts. 269; Fearne, Rem. 383, note (a).

hold, being liable to determine, without entry by the grantor or his heirs, upon the happening or not happening of the event indicated, and the subsequent estate taking its place; e. g., a devise, or grant, etc., to A. and his heirs, but if A. die without having married W., then to Z. in fee.⁴⁹

Conditional limitations could not exist at common law. They arise only out of certain conveyances owing their existence to statutes, the effect of which is to dispense with livery of seisin.⁵⁰

§ 481. Same—Reason Why Conditional Limitation Over is Void at Common Law. As already stated, the reason is because, at common law, in order to give effect to the condition, the grantor, or his heirs, must re-enter, and thus being restored to his or their original estate and seisin, will avoid as much the subsequent limitation as the immediate estate.⁵¹

Thus, in case of a feoffment with livery at common law "to A. and his heirs on condition that if A. marry Z. then the land shall go to W.," the only way in which A.'s estate can, at common law, be terminated in case of a breach of the condition, is by the re-entry of the feoffor or his heirs, who, upon entering, would be seised of the same estate as they had before the feoffment, which, of course, could not be without destroying the limitation to W., as well as the estate of A.⁵²

Again the subsequent estate is void as a remainder, because by the very definition of a remainder it must not take effect in derogation of the preceding estate, but must await its regular expiration.⁵³

Hence, upon a conveyance at common law, with livery of seisin, "to A. for life, but if A. marries W. to go at once to B. and his heirs," the estate of B. by the terms of the limitation is not to await the regular expiration of A.'s estate (that is, A.'s death), which is necessary for a valid remainder, but is to cut short and interrupt A.'s estate before its regular expiration, or, as it is expressed, is to take effect in derogation of A.'s estate. The result is, at common law, that A.'s marriage to W. does not ipso facto terminate A.'s estate, which remains in him until it is terminated by the re-entry of the grantor or his heirs, and upon such re-entry the grantor or his heir is seised of the original estate by paramount title, thus not

⁴⁹ 2 Min. Insts. 269; 2 Bl. Com. 155; 2 Th. Co. Lit. 87, note (L; 2), 768, Butler's note II.

⁵⁰ 2 Min. Insts. 270; 2 Th. Co. Lit. 768, Butler's note II.

⁵¹ 2 Min. Insts. 268, 270; 2 Th. Co. Lit. 97, 99, note (W, 2), 768, Butler's note II.

⁵² Ante, § 474; 2 Min. Insts. 267, 270.

⁵³ 2 Min. Insts. 270; 2 Th. Co. Lit. 136, note (F); post, §§ 592, 650.

only destroying A.'s estate *ab initio*, but at the same time wiping out all subsequent limitations over to others.⁵⁴

§ 482. Same—Conditional Limitation Over Good under Statutes of Uses and Wills. The statutes of uses and of wills having dispensed with the notoriety of livery to commence the freehold estate, the corresponding notoriety of entry to terminate the freehold has also been dispensed with in all cases where, upon the happening of a contingency, the land is to go over to another, and so, since the passage of the above-mentioned statutes, B. would take a valid estate by way of conditional (or shifting or executory) limitation.⁵⁵

But if upon the happening of the contingency the estate is not to go over to another, but merely to cease and determine, the common-law rule still prevails, and the grantor or his heirs must, in order to terminate the grantee's estate, enter actually or constructively for breach of the condition, or institute an action therefor.

§ 483. Who may Perform Conditions. The general doctrine is that all persons may perform, or offer to perform, the conditions, who have an interest to do so; that is, who have an interest in the condition on the one side, or in the land on the other. Hence, upon a grant with condition to be void upon the payment of money upon a day named, the grantor's heir, or personal representative, in case of his death before the day, although neither of them be named, may pay or tender the money, and so fulfill the condition, and defeat the grantee's estate. So, also, upon a grant with condition to be void unless the grantee shall pay a certain sum by a day named, if the grantee aliens the property before the day, either he or the alienee may, at the day, perform the condition, by paying or tendering the money; he, because he has an interest as party and privy in the condition, and the alienee, because he has an interest in the land.⁵⁶

If no day be named for performance of the condition, the time (unless the contrary be expressed) is limited always to the life of him who is to perform it, and in some cases, where that latitude would be productive of injustice, is restricted to a reasonable time. This consideration will sometimes modify the doctrine above stated. Thus, if no day be named for the payment of the money by the grantor in the first case, the time to perform the condition expires with his life, unless the contrary appear, and then, of course, payment cannot be made or tendered by his heir or personal representatives, unless they be expressly named. So in the second case, if no day for the payment be appointed, the grantee has not during his

⁵⁴ Ante, § 474.

⁵⁵ 2 Min. Insts. 270, 271; post, § 680 et seq.

⁵⁶ 2 Min. Insts. 278; 2 Th. Co. Lit. 38 et seq.

life to make it, since it would be unjust that, having the land, he should retain the money also; but he or his alienee must pay within a reasonable time, and if he omits to do so the condition is broken, and neither he nor his alienee can afterwards save it by a tender of the money.⁵⁷

A stranger cannot, in general, intrude himself into the business, and a tender of payment by such a one may be denied and disregarded, as not being a performance of the condition. To this principle there seem to be but two exceptions, namely, where a stranger tenders in the name and on behalf of an infant, or idiot, and where he tenders in the name and on behalf of the proper party, and the payment is accepted by him to whom it is tendered, and afterwards ratified by the person who might have made it, for *omnis ratihabitio retrotrahitur et mandato æquiparatur*.⁵⁸

§ 484. Strictness Demanded in Performance of Conditions—Conditions Precedent. As estates are to arise upon the performance of conditions precedent, they are regarded with liberality, and whilst they must always be fulfilled, not colorably merely, but bona fide and substantially, yet it suffices to perform them according to the intent and meaning, albeit the letter and words cannot be performed. This is in pursuance of the maxim which requires words to be construed most strongly against the user of them. But otherwise it is, as we shall see, of conditions subsequent, that destroy an estate; for they are to be taken strictly, unless it be in certain special cases. And in no case can an estate vest until the condition precedent is performed.⁵⁹

§ 485. Same—Conditions Subsequent. Conditions subsequent go to defeat estates which have vested, and to change the existing state of things. Hence they are regarded less favorably than conditions precedent, and must be performed with more strictness, as a general rule.⁶⁰

If a condition consists of divers parts in the conjunctive, whether it be subsequent or precedent, all the parts must be performed, unless it be impossible to be so performed, when it is to be taken in the disjunctive; but otherwise it is, if it be in the disjunctive, for then the performance of either will suffice. And if it be both in the conjunctive and disjunctive, the disjunctive is understood to refer to the whole, and to make all disjunctive.⁶¹

⁵⁷ 2 Min. Insts. 278; 2 Th. Co. Lit. 45 note (E, 1).

⁵⁸ 2 Min. Insts. 278, 279; 2 Th. Co. Lit. 43.

⁵⁹ 2 Min. Insts. 292; 2 Th. Co. Lit. 58, 59.

⁶⁰ 2 Min. Insts. 292, 293; 2 Th. Co. Lit. 59.

⁶¹ 2 Min. Insts. 293; 2 Th. Co. Lit. 58, 59, notes (M, 1), (N, 1).

§ 486. **Time of Performance of Conditions.** If a particular time is appointed for performance, the condition must be performed at or before the appointed time, and the right to perform passes to an alienee or to the personal representative, or may descend to the heir.⁶²

But, if no particular time is appointed for performance, it must in general be performed at least within the lifetime of the party obligated to perform, and when that latitude would be productive of injustice it must be performed within a reasonable time.⁶³

§ 487. **Same—Condition When to be Performed within a Reasonable Time.** The condition must be performed within a reasonable time, when the act to be done is merely transitory (not local), e. g., the payment of money, the delivery of a deed, etc.; or where promptness of performance is needful in order to protect the rights of the other parties, e. g., feoffment on condition that feoffee pay, or in case of a conditional sale, etc. That the feoffee should have the estate, and retain the money also, indefinitely, is not just, and therefore he or his alienee must pay within a reasonable time.⁶⁴

§ 488. **Same—When Party Has During Life to Perform Condition.** Where prompt performance of the condition in no wise concerns the other party, the time is protracted through the performer's life, e. g., feoffment on condition that if feoffor pays, etc., he may re-enter. Here, since the feoffee is in possession of the land, it is supposed not to concern his interests how long the feoffor may delay the performance, and so the feoffor has his lifetime in which to pay.⁶⁵

But the party to perform the condition is liable to be hastened by request where the act to be done is local (and not transitory), and it concerns the other party that it be done promptly; e. g., condition that feoffee shall re-enfeoff feoffor.⁶⁶

Furthermore, where the performance of a condition depends in any way upon the pleasure of the performee, as regards the manner or time of performance, or as to whether it shall be performed at all, or depends upon information peculiarly in his possession, he must request performance of the condition before he can claim a forfeiture.⁶⁷

⁶² 2 Min. Insts. 293, 278; ante, § 483; 2 Th. Co. Lit. 45.

⁶³ 2 Min. Insts. 293; 2 Th. Co. Lit. 45, note (E, 1).

⁶⁴ 2 Min. Insts. 293; 2 Th. Co. Lit. 45, note (E, 1); Bac. Abr. Conditions (P, 3). See *Tuggle v. Berkeley*, 101 Va. 83, 43 S. E. 199.

⁶⁵ 2 Min. Insts. 293.

⁶⁶ 2 Min. Insts. 294; 2 Th. Co. Lit. 47; Bac. Abr. Conditions (P, 3).

⁶⁷ 1 Tiffany, Real Prop. § 71; 1 Smith, Lead. Cas. 132; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163; *Bradstreet v. Clark*, 21 Pick. (Mass.) 389;

§ 489. Place of Performance of Conditions. If a particular place for the performance be named, that is of course the proper place for the performance of the condition, unless subsequently changed by mutual consent.⁶⁸

If no certain place be appointed, the place of performance is to be determined by adverting to the character of the act to be done in performance of the condition; a distinction being made between conditions to pay money and conditions to do a collateral thing.⁶⁹

§ 490. Same—Condition to Pay Money. If the condition be to pay rent, in the absence of stipulation as to the place of payment, the rule of law is that it must be paid upon the leased premises, or tendered or demanded there.⁷⁰

But if the condition is to pay money generally, it is to be performed by payment to the payee wherever he may be found within the state, and it is the payer's business to seek him out.⁷¹

§ 491. Same—Condition to Do a Collateral Thing.—1. To Deliver an Article. If the performer of the condition be the grower or manufacturer of, or a dealer in, the article to be delivered, the place of delivery, in the absence of a contrary agreement, is the performer's farm, factory, or shop.⁷²

If the performer of the condition is not a grower, manufacturer or dealer, and the articles are easily portable, such as cattle and the like, they are deliverable at the residence of the performee;⁷³ but if they are cumbrous and not easily portable, such as timber, they are deliverable where the performee shall appoint, or if he, upon application, names no place, or an unreasonable one, then at such reasonable and convenient place as the performer shall appoint giving the performee reasonable previous notice, if practicable.⁷⁴

§ 492. Same—2. Collateral Condition Other than the Delivery of Articles. The condition is to be performed where the performee shall reasonably appoint, or if, when applied to, he names no place,

Merrifield v. Cobleigh, 4 Cush. (Mass.) 182; Irvine v. Irvine (Ky.) 15 S. W. 511; Royal v. Aultman, 116 Ind. 424, 19 N. E. 202, 2 L. R. A. 526.

⁶⁸ 2 Min. Insts. 294.

⁶⁹ 2 Min. Insts. 294.

⁷⁰ 2 Min. Insts. 294; 2 Th. Co. Lit. 49; Bac. Abr. Conditions (P, 4).

⁷¹ 2 Min. Insts. 294; 2 Th. Co. Lit. 47 et seq.; Bac. Abr. Conditions (P, 4).

⁷² 2 Min. Insts. 294; 2 Greenleaf's Cruise, 29; 2 Greenleaf, Ev. § 609 et seq.

⁷³ 2 Min. Insts. 294; 2 Greenleaf's Cruise, 29; 2 Greenleaf, Ev. § 609 et seq.

⁷⁴ 2 Min. Insts. 294; 2 Greenleaf's Cruise, 29; 2 Greenleaf, Ev. § 609 et seq.

or an unreasonable one, then where the performer shall reasonably appoint, giving the performee reasonable previous notice, if practicable.⁷⁵

§ 493. Default of Performee as Excuse for Nonperformance of Condition. It is a general maxim of the law that a man shall not profit by his own wrong. Hence, if the performee is absent at the proper time and place, when his presence is needful to the act of performance, this practically constitutes a waiver of performance, and the obligor is excused from performing the condition at any other time or place.⁷⁶

And the positive and deliberate obstruction by the performee of the performance of the condition a fortiori excuses nonperformance.⁷⁷

§ 494. Same—Tender of Performance and Refusal. This will also excuse the obligor from performing the condition. Thus, if a grantor on condition to pay money (as a mortgagor) at the day and place appointed makes a legal tender of the money to the grantee, and it is refused, or if the condition be that the grantee shall enfeoff, and at the appointed day and place he offers to enfeoff, and it is refused, in these cases the tender and refusal are equivalent to performance, so far as the condition is concerned. And if the condition be to do a collateral thing, or to pay money, if it is a sum in gross, collateral to the land, the benefit thereof is, by the tender and refusal, wholly and forever lost, there being no remedy therefor at law. If there were a covenant or promise to pay the money, or to do the collateral thing, tender and refusal do not necessarily extinguish that, since, although the condition be gone, the covenant remains, and may be enforced by action, if the covenantor is in default.⁷⁸

§ 495. Same—Performee's Failure to Do the First Act. Thus, if previous notice or request is required, or any precedent condition is to be fulfilled by the performee, the omission of such previous notice, request, or antecedent condition excuses nonperformance by the obligor.⁷⁹

Whether any stipulation is a condition precedent to the performance of the condition in question is sometimes a perplexing question. It is admitted to depend upon the intention of the parties, as

⁷⁵ 2 Min. Insts. 295; 2 Greenleaf's Cruise, 29; 2 Greenleaf, Ev. § 609 et seq.

⁷⁶ 2 Min. Insts. 297; Dumpsor's Case, 4 Co. 119b, 1 Smith, Lead. Cas. 47 et seq., 105 et seq.; post, § 497.

⁷⁷ 2 Min. Insts. 297; 2 Greenleaf's Cruise, 34.

⁷⁸ 2 Min. Insts. 297; 2 Th. Co. Lit. 68 et seq.

⁷⁹ 2 Min. Insts. 298; St. Albans v. Shore, 1 II. Bl. 270, 273, note; Hard v. Wadham, 1 East, 619.

disclosed by their language; but that intention is not unfrequently hard to explore. If the condition is to pay money, this general rule may be stated, that where the thing which is the consideration for the money is to be done before the time arrives for the payment, the doing of the thing is a condition precedent to the payment of the money, and in an action at law must be necessarily averred and proved before the money can be recovered. But where the time appointed for the payment of the money does arrive, or may arrive, before the time appointed for the doing of the thing, the latter is not a condition precedent to the demand of the money.⁸⁰

§ 496. **Waiver by Performee of Performance of Condition.** The performee may undoubtedly waive the performance of the condition; but mere indulgence or silent acquiescence does not imply a waiver. The conduct from which it may be implied must be such as cannot be reconciled with a purpose to insist upon the condition.⁸¹ But even an express waiver of the performance of a condition contained in a deed would be of no avail, if such consent to the nonperformance be by parol merely,⁸² unless by his silence or verbal acquiescence the grantor has induced the grantee to expend money on the property in the belief that the condition will not be enforced, in which case the grantor would be estopped to enforce it.⁸³

§ 497. **Same—Rule in Dumpor's Case.** Under the authority of Dumpor's Case⁸⁴ the rule has been promulgated, with doubtful propriety, that a license once given for the breach of a condition discharges it forever.⁸⁵

So far as this rule is applied to conditions to do or not to do a single act at or by a certain time and at a certain place, it would clearly seem to be founded upon correct principles; for if the obligor be excused from performance of such a condition at the time and place stipulated, to compel him to perform it at some other time and

⁸⁰ 2 Min. Insts. 298; Thorp v. Thorp, 1 Salk. 177; Pordage v. Cole, 1 Saund. 319; Brockenbrough v. Ward, 4 Rand. (Va.) 355.

⁸¹ 2 Min. Insts. 298.

⁸² 1 Washburn, Real Prop. 454; Perry v. Davis, 3 C. B. (N. S.) 769; Gray v. Blanchard, 8 Pick. (Mass.) 284, 291.

⁸³ Kenner v. American Contract Co., 9 Bush (Ky.) 202; Yancey v. Savannah & W. R. Co., 101 Ala. 234, 13 South. 311; Moses v. Loomis, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194; Barrie v. Smith, 47 Mich. 130, 10 N. W. 168.

⁸⁴ 4 Co. 119b, 1 Smith. Lead. Cas. 47 et seq., 105 et seq.

⁸⁵ Williams, Real Prop. 398; 1 Washburn, Real Prop. 317, note; Dakin v. Williams, 17 Wend. (N. Y.) 447; Williams v. Dakin, 22 Wend. 209; Gannett v. Albree, 103 Mass. 372; Wertheimer v. Wayne Circuit Judge, 83 Mich. 56, 47 N. W. 47, 21 Am. St. Rep. 587, 588, note; Sharon Iron Co. v. City of Erie, 41 Pa. 341. See 1 Tiffany, Real Prop. § 72; 7 Am. Law Rev. 616.

place would be, not to enforce the old condition, but to make a new agreement for the parties.⁸⁶

In *Dumpor's Case*⁸⁷ the facts were that a lease was made upon a condition that "the lessee and his assigns (presumably by operation of law, as personal representatives, etc.) should not aliene without the special license of the lessor," and it was held that, if the license were once given, the condition was thereafter null and void.⁸⁸

But, notwithstanding this decision, it seems quite certain that the rule there laid down is not applicable to conditions of a continuing and recurrent character, which contemplates repeated or periodical acts, and therefore repeated or periodical possibilities of breach. Thus, if there be a condition in a lease that the lessee shall pay a stipulated rent at the beginning of each month, the fact that the landlord excuses the lessee from one such payment would not discharge the entire condition, or rather series of conditions.⁸⁹

§ 498. Waiver of Forfeiture for Breach of Condition. Not only may the performance of a condition be waived, as just shown, but there may likewise be a waiver, express or implied, of the grantor's right of re-entry for a breach already committed; but such a waiver can arise only after the grantor, or his heir, has received knowledge of the breach.⁹⁰

Wherever the grantor, after knowledge of the breach, does any act which unequivocally recognizes the grantee's interest as still subsisting, it amounts to a waiver of the forfeiture.⁹¹

Hence, if, after knowledge of the breach, a lessor accepts rent from the lessee or his assignee which has accrued since the date of the breach, it amounts to a waiver of the forfeiture, though he protests against such a conclusion when he receives the money.⁹²

⁸⁶ Ante, §§ 493, 494.

⁸⁷ 4 Co. 119b, 1 Smith, Lead. Cas. 47 et seq., 105 et seq.

⁸⁸ See *Pennock v. Lyons*, 118 Mass. 92; *Murray v. Harway*, 56 N. Y. 337; *Dougherty v. Matthews*, 35 Mo. 520, 88 Am. Dec. 126; *Brunnell v. McPherson*, 14 Ves. 173.

⁸⁹ See 1 Tiffany, Real Prop. § 72; notes to *Dumpor's Case*, 1 Smith, Lead. Cas. 105, 108, 110.

⁹⁰ 2 Min. Insts. 298; 1 Smith, Lead. Cas. 110; *Guild v. Richards*, 16 Gray (Mass.) 309; *Stevens v. Taylor*, 58 Iowa, 664, 12 N. W. 625; *Andrews v. Senter*, 32 Me. 394.

⁹¹ *Green's Case*, Cro. (Eliz.) 3; *Deaton v. Taylor*, 90 Va. 219, 17 S. E. 944; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Duryee v. City of New York*, 96 N. Y. 477; *Grigg v. Landis*, 21 N. J. Eq. 494.

⁹² *Davenport v. Regina*, 3 App. Cas. 115; *Pennant's Case*, 3 Co. 64a; *McKildoe v. Darracott*, 13 Grat. (Va.) 278; *Bowling v. Crook*, 104 Ala. 130, 16 South. 131; *Stuyvesant v. Davis*, 9 Paige (N. Y.) 427; *Moses v. Loomis*, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 198, note.

Such a waiver, it should be observed, operates only on previous breaches, and does not affect the right to take advantage of a subsequent breach. A waiver of future performance, such as was discussed in the two preceding sections, is not thus to be inferred from a waiver of forfeiture for a past breach.⁹³

Nor can the waiver of the forfeiture for a breach of condition affect the question as to what will constitute a subsequent breach, as by extending the time for the performance of the condition. Thus, in an English case,⁹⁴ it was held that, though a previous breach of condition to repair had been waived by the acceptance of rent, a forfeiture might be subsequently enforced for nonrepair after the lapse of a reasonable time after the repairs became necessary, though such reasonable time had not elapsed since the receipt of the rent.

§ 499. Impossible Conditions—I. Conditions Precedent. So far as land is concerned, it is an invariable principle of the common law that conditions precedent must be performed before the estate can vest.⁹⁵ It follows, therefore, that if such condition becomes impossible, at whatsoever time, or by whatsoever means, even though it be by the act or default of the grantor, yet no estate can arise.⁹⁶

It may be added, further, that if the condition precedent is uncertain, so that it cannot be ascertained to have been fulfilled, no estate can arise. Thus, in case of a grant to A. (a man), on condition that he shall be married before Z. (a woman), and they intermarry together, no estate arises for the uncertainty.⁹⁷

§ 500. II. Impossible Conditions Subsequent—1. Impossible When Created. As the performance of the condition is to defeat the estate, the impossibility of performance, when the condition was created, makes the grantee's estate absolute, which must have been the intent of the grantor from the beginning. Hence, in a grant with condition to be void if the grantor shall go from New York to London in an hour, the condition, being (at least, at present) impossible, is void, and the grantee's estate is absolute.⁹⁸

⁹³ *McKildoe v. Darracott*, 13 Grat. (Va.) 278; *Crocker v. Old South Society in Boston*, 106 Mass. 489; *Ireland v. Nichols*, 46 N. Y. 413; *Bleeker v. Smith*, 13 Wend. (N. Y.) 533; *Alexander v. Hodges*, 41 Mich. 691, 3 N. W. 187.

⁹⁴ *Baker v. Jones*, 5 Exch. 498.

⁹⁵ Ante, §§ 468, 472.

⁹⁶ 2 Min. Insts. 279; 2 Th. Co. Lit. 18 note (K), 22, 23, note (N); 1 Lom. Dig. 349; *Burdis v. Burdis*, 96 Va. 81, 30 S. E. 462, 70 Am. St. Rep. 825, and note.

⁹⁷ 2 Min. Insts. 279, 280; 2 Th. Co. Lit. 18.

⁹⁸ 2 Min. Insts. 280; 2 Th. Co. Lit. 22.

The impossibility contemplated is that which is inherent and permanent, not merely improbable, or out of the power of that party, or out of human power, to control. Thus, a condition that "a married man shall marry such a woman," that "the Pope shall be in London within a week," or that "it shall rain to-morrow," are none of them impossible.⁹⁹

§ 501. Same—2. Performance Subsequently Made Impossible by Act of God or of Performee. If a condition annexed to lands be possible at the making of the condition, and afterwards become impossible by the act of God, or of the beneficiary of the condition, yet the estate or right to which the condition is incident shall not be avoided. Thus, if a man make a grant on condition that the grantor shall, within one year, go to Europe about the affairs of the grantee, and within a year the grantor die, or commit a felony for which he is kept in close prison, so that in one event it is impossible by the act of God, and in the other by the act of the grantor himself, that the condition should be performed, yet the estate of the grantee is absolute; for if the land should by construction of law be taken from the grantee, this would be, in the one case, for the condition which was made for the grantee's benefit to work a damage to him, and in the other, for the grantor, who was the cause of the impossibility of the condition being performed, to take advantage of the nonperformance; that is, of his own wrong.¹

Upon the same principle, if an estate be given to A. and his heirs, but unless he marry B. by a certain day his estate to cease, and B. dies, or the grantor marries her himself, the estate is absolute in A.²

So, also, if the benefit of the condition is to redound to the grantor, no impossibility of compliance brought about by the act of the grantee shall work any injury to the grantor, who shall avoid the grantee's estate just as if he had fulfilled the condition, for else the grantee would take advantage of his own wrong.

The student will not fail to observe that the condition is supposed always to be subsequent, as we have seen that the common law holds it to be invariably necessary that a condition precedent should be performed before the estate can vest.³

§ 502. Same—3. Performance Subsequently Made Impossible by Act of Performer. If the condition is made impossible of performance by the act of the party whose duty it is to perform it, as no man is allowed to profit by his own wrong, the condition is looked upon as performed, and the grantee's estate is defeated.⁴

⁹⁹ 2 Min. Insts. 280; 2 Th. Co. Lit. 23, note (O).

¹ 2 Min. Insts. 280, 281; 2 Th. Co. Lit. 19, 21.

² 1 Washburn, Real Prop. 447.

³ 2 Min. Insts. 296.

⁴ 2 Min. Insts. 281; 2 Th. Co. Lit. 50.

§ 503. **Same—4. Impossible Conditions in the Conjunctive and Disjunctive.** If one of two conditions conjunctive be impossible at the time it was created, or become impossible afterwards, by the act of God, the other must be performed, and in general the performance of that will be sufficient.⁵

But if the conditions are in the disjunctive or alternative, the party originally having an election which he will perform,⁶ it is said he is not to be deprived of that choice by the act of God. Hence, if one of the alternatives becomes, after the creation of the condition, providentially impossible, he is excused from the performance of the other; but not, it seems, if the condition were for the benefit of the performee, and certainly not if it became impossible otherwise than by the act of God, and especially by the default of the obligor himself. Thus, where the condition was to settle lands on Jane G. and her heirs, or else that the obligor would leave her by his will a proportionate legacy, and J. G. died before obligor, whereby it became by the act of God impossible to leave her a legacy by the obligor's will, it was held that he was discharged from the other alternative of settling lands on J. G.'s heirs.⁷

But had the condition been to settle land on Jane G. or her heirs, so that the heirs would have been, not merely by representation, but directly, the objects of the condition, it might have been otherwise.⁸

And it has been adjudged that when the condition was to make a lease for the life of the obligee before such a day, or pay him £100, and the obligee died before the day, yet that obligor should pay the £100. So, also, where the lessee of a mill covenanted (and covenants and conditions in this regard stand on the same footing) to leave the millstones in as good plight as he found them, or else to pay such damages as A. should assess, and A. made no assessment, it was held that it was the duty of the obligor to have procured the assessment; and as that alternative had failed by his own default, he should not be excused from the other.⁹

The propriety of the doctrine has, indeed, been questioned in all cases, save where the impossibility of performing one of the alternatives is occasioned by the act of the obligee.¹⁰

§ 504. **Illegal Conditions—I. General Effect of Illegal Conditions.** The effect of an illegal condition in general depends upon

⁵ 2 Min. Insts. 296; 2 Th. Co. Lit. 58, 60; 2 Greenleaf's Cruise, 33.

⁶ Ante, § 485; 2 Min. Insts. 293, 296.

⁷ 2 Min. Insts. 296; *Laughter's Case*, 5 Co. 22a.

⁸ 2 Min. Insts. 296, 297.

⁹ 2 Min. Insts. 297; *Studholme v. Mandell*, 1 Ld. Raym. 279; *Da Costa v. Davis*, 1 Bos. & P. 242.

¹⁰ 2 Min. Insts. 297; *Bac. Abr. Conditions* (K, 2); *Da Costa v. Davis*, 1 Bos. & P. 242; *Stevens v. Webb*, 7 Carr. & P. 61.

whether the condition be precedent or subsequent. The general rule of the common law is, as we have seen, that the estate cannot vest in any case of condition precedent, unless the condition be complied with; and when the condition is illegal, public policy will not permit one to derive a benefit from an illegal act, so that, even though the condition were performed, still the estate could not take effect. It is therefore void, whether the condition is or is not fulfilled.¹¹

If the condition is subsequent, the condition is void, and the estate remains unimpaired, and would be so even though the conditions were performed, for the reasons just stated.¹²

Indeed, to generalize, in all cases of illegal conditions, the law, being concerned to remove all temptations and inducements to crimes and unlawful acts, so directs its policy as shall be best calculated to discourage what it condemns, and in so doing always acts so as to deprive the person to be benefited by the performance of an illegal condition of that benefit, thus removing the temptation to violate the law. Thus, if the illegal condition be annexed to a bond, the bond is void, because thereby the wrong is most effectually rebuked and prevented, whilst if annexed to an estate, its effect (always with the same design) depends on whether the condition be precedent or subsequent. If precedent, the estate is void; if subsequent, it is absolute.¹³

§ 505. II. Conditions Pro Turpi Causa. The principles just considered will elucidate most of the instances of immoral conditions that present themselves. Thus, where the condition of a bond is that the obligee and obligor should live together in illicit cohabitation, the bond is void, the condition being pro turpi causa. If it be given in consideration of past cohabitation with an unmarried woman, it is not liable to the same objection, and is good, because it shall be intended as a compensation for the wrong done. If, however, either party be married, and that fact were known to the other at the time, the obligation is tainted with incurable illegality, whether the consideration were past or future cohabitation.¹⁴

But in case of a deed (an executed contract) conveying an estate upon condition of future sexual intercourse or other illegal or im-

¹¹ 2 Ante, § 468; 2 Min. Insts. 287; 2 Th. Co. Lit. 22, 24, note (P).

¹² 2 Min. Insts. 287; 2 Th. Co. Lit. 21, note (N), 24, note (P); Myers v. Daviess, 10 B. Mon. (Ky.) 394; Barksdale v. Elam, 30 Miss. 694; St. Louis, J. & C. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122.

¹³ 2 Min. Insts. 282; 2 Th. Co. Lit. 23; Mitchell v. Reynolds, 1 P. Wms. 189.

¹⁴ 2 Min. Insts. 282; 2 Th. Co. Lit. 24, note (P). A promise of marriage made upon condition of sexual intercourse is illegal and void. Burke v. Shaver, 92 Va. 345, 23 S. E. 749.

moral condition, the condition, if subsequent, would be void, and the estate absolute.¹⁵

§ 506. **III. Conditions in Restraint of Trade.** The general doctrine is that all restraints of trade (which the law much favors), if nothing more appear, are illegal. But this general doctrine is not without exceptions. For example, if the restraint have reference to a limited space, more or less extended, according to the nature of the business, or is to endure for a reasonable and limited time only, it is not illegal.¹⁶

§ 507. **IV. Conditions in Restraint of Marriage.** These are not strictly illegal conditions, since they are not conditions to do an illegal act nor to omit a legal duty, but they tend to affect injuriously that important policy of the state which seeks to encourage, not only marriage itself, but the utmost freedom of choice in selecting a mate, and, being contrary to public policy, are for that reason treated as equivalent to illegal conditions, at least where the result is to restrict marriage unreasonably, or in some cases if they restrict marriage at all.¹⁷

Such conditions are to be viewed in the following aspects: (1) Marriage brokerage conditions; (2) conditions in restraint of marriage annexed to conveyances or devises of land; (3) conditions in restraint of marriage annexed to legacies charged upon land; (4) conditions in restraint of marriage distinguished from limitations until marriage; (5) similar conditions annexed to legacies charged upon personalty. These will be taken up in their order.¹⁸

§ 508. **Same—1. Marriage Brokerage Conditions.** Conditions stipulating for the procuring of marriages are justly regarded as of ruinous consequences, in general, to the happiness of one or both of the parties, and as tending to delude persons of fortune. Such conditions, therefore, invariably invalidate all bonds to which they are annexed, and if annexed to estates, when precedent, the estate cannot take effect, and when subsequent, the estate cannot be defeated. Nor is it material whether the procurement of a marriage is the

¹⁵ Ante, § 504.

¹⁶ 2 Min. Insts. 282, 283; 2 Th. Co. Lit. 24, note (P). See *Merriman v. Cover*, 104 Va. 428, 51 S. E. 817.

¹⁷ See post, §§ 512, 513; *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604. In this case it was held that a condition involved in its performance a probable separation of husband and wife. Conditions involving divorce or separation between husband and wife are in general void. 2 Jarman, Wills, 852, note (a); *Conrad v. Long*, 33 Mich. 78; *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391.

¹⁸ 2 Min. Insts. 283 et seq.; *Coppage v. Alexander*, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153, note.

past consideration, or future condition, of the transaction. Such attorneyship is alike frowned upon under all circumstances. And, upon like principles, any private arrangement, infringing the open and public agreement on the marriage, is held to be fraudulent and void.¹⁹

§ 509. Same—2. Conditions Restricting Marriage Annexed to Conveyance or Devise of Land. The common-law principles touching the effect of illegal conditions are applicable here in general.²⁰

If the condition be precedent, however restrictive of marriage, it must be complied with before the estate can vest;²¹ and if the condition be subsequent, its validity depends upon whether it is unreasonably restrictive of marriage or not, according to the principles of the common law. Thus, where a testator gave certain property to his daughter, but declared that as, in consequence of a nervous debility, she was unfit for the control of herself, his will was that she should not marry, and that, if she did, the gift should be void, the condition was held to be invalid, and the estate absolute.²²

But, by the current of authority, conditions restraining persons widowed from marrying again are sustained as valid.²³

§ 510. Same—3. Conditions Restricting Marriage Annexed to Legacies Charged on Land. In this case, also, as in that of conditions restraining marriage annexed to conveyances or devises of land, the principles of the common law have always been freely applied by the Courts of Chancery, uninfluenced by the peculiar views (drawn from the civil law) applied by the ecclesiastical courts to similar conditions annexed to legacies charged upon personal property,²⁴ but which never had any jurisdiction over legacies charged upon real property. Hence exactly the same principles are applicable in the case of legacies charged upon land as in the case of the conveyance or devise of the land itself.²⁵

§ 511. Same—4. Conditions in Restraint of Marriage Distinguished from Special Limitations until Marriage. The general dis-

¹⁹ 2 Min. Insts. 283; 2 Th. Co. Lit. 24, note (P); 1 Parsons, Contracts, 556.

²⁰ Ante, § 504.

²¹ 2 Min. Insts. 285, 265; 1 Th. Co. Lit. 19, note (K); Scott v. Tyler, 2 Bro. Ch. 488, 2 White & Tud. Lead. Cas. Eq. 318.

²² 2 Min. Insts. 286; 1 Th. Co. Lit. 19, note (K); 1 Story, Eq. Jur. § 288; Morley v. Rennoldson, 2 Hare, 570, 579; Scott v. Tyler, 2 Bro. Ch. 431, 2 White & Tud. Lead. Cas. Eq. 319; Smythe v. Smythe, 90 Va. 638, 19 S. E. 175; Maddox v. Maddox, 11 Grat. (Va.) 804.

²³ 2 Min. Insts. 285; 1 Story, Eq. Jur. § 285; 1 Roper, Legacies, 832; 2 Jarman, Wills, 44, note (2); Scott v. Tyler, 2 Bro. Ch. 488, 2 White & Tud. Lead. Cas. Eq. 319.

²⁴ Post, § 512 et seq.

²⁵ Ante, § 509; 2 Min. Insts. 284 et seq.

inction existing between conditions and special or common-law limitations has been already noted. Applying that distinction to the present case, it will be observed that, while an estate upon condition subsequent unreasonably restrictive of marriage is absolute and without condition (the condition being void),²⁶ it is otherwise if the restraint of marriage (though total) is in the form of a special limitation, the function of which is to mark out the extreme limit of the duration of the estate, beyond which it cannot endure without making a new contract for the parties.

Thus a devise "to A. until she marries, and then the land to pass to Z." is a limitation, and good; whilst a "devise to A. for life, on condition that, if she marries, the land shall pass to Z.," is a condition, and, because it absolutely prohibits marriage, is void—that is, the condition is void, and, being a condition precedent to Z.'s estate, Z. can take no interest, present or future, in the land conveyed.²⁷

§ 512. Same—5. Conditions Restraining Marriage Annexed to Legacies Charged upon Personalty—A. In General. Marriage is an institution of such importance to the well-being and happiness, and even to the continuance, of society, that it is impossible for any system of law to regard restraints tending materially to affect its freedom without disapprobation. The civil and canon law deem any clogs whatsoever upon the perfect freedom of marriage inexpedient, and invalidate all conditions which restrict it in any manner. The common law, on the other hand, holds it to be illegal to prohibit marriage altogether, or even to impose restrictions upon it for an unreasonable period, or subject to unreasonable terms; but it does not condemn conditions whereby marriage is moderately and reasonably restrained in respect of time, place, person, consent of guardian, etc.²⁸

The blending of these discordant views of policy, in a very inharmonious and irregular manner, has made a strange patchwork of the law, as administered in the English courts and our own, touching the subject of the annexation to legacies of conditions restraining marriage. Legacies payable out of the personalty only were originally cognizable in England in the ecclesiastical courts alone, which, being regulated by the principles of the civil and canon law, esteemed all conditions in restraint of marriage to be opposed to the

²⁶ Ante, §§ 509, 510.

²⁷ 2 Min. Insts. 285; *Scott v. Tyler*, 2 Bro. Ch. 488, 2 White & Tud. Lead. Cas. Eq. 321; *Selden v. Keen*, 27 Grat. (Va.) 582 et seq.; *Mann v. Jackson*, 84 Me. 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. Rep. 358.

²⁸ 2 Min. Insts. 283, 284; *Coppage v. Alexander*, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153, note.

well-being of society, and void. Hence, when the Court of Chancery, at a later period, assumed a concurrent jurisdiction to enforce the payment of legacies, upon the ground of the trust involved, it adopted for the most part, but not wholly, the doctrines and rules it found prevailing upon the subject in the ecclesiastical courts; it being manifestly undesirable that the subject should have a different measure of justice, according as he happened to sue in one or the other tribunal.²⁹

The doctrines of the Court of Chancery in respect to such conditions, when annexed to devises, and to legacies charged on lands, are uniform, and easily intelligible. The complexity is in respect of legacies charged on personalty alone; and in them it grows out of the fact that the Court of Chancery did not, as to them, adopt wholly the rules which it found prevailing in the ecclesiastical courts, nor without a certain regard to the principles of the common law. On the contrary, whenever it discovered that the testator's intention was fixed to make the condition respecting marriage indispensable to the enjoyment of his bounty, and that otherwise he designed the gift to go over to some one else, the condition prevailed, unless it was entirely prohibitory or unreasonably restrictive of marriage, when the common law held it to be void.³⁰

Hence, in all cases of legacies given upon conditions affecting liberty of marriage, the most important inquiry is whether the legacy be payable out of the real or out of the personal estate; and the next most important point to be observed is whether it is given over to some one else if the conditions be not complied with.³¹

§ 513. Same—B. Legacy Given Over to Another upon Marriage. The condition, whether precedent or subsequent, must be complied with, unless it be unreasonably restrictive of marriage, in which case it is wholly void, and the legacy is absolute. The student will observe what a mingling is here of the principles of the civil and common law. The civil law, alone considered, would have disregarded the condition under all circumstances, and have held the legacy always absolute. The common law, considered alone, would have pronounced the condition, whether precedent or subsequent, necessary to be observed, unless it were unreasonably restrictive of marriage, in which event it would have disregarded the condition subsequent as void, so making the legacy

²⁹ 2 Min. Insts. 284.

³⁰ 2 Min. Insts. 284, 285; 1 Story, Eq. Jur. § 283 et seq.; *Garbut v. Hilton*, 1 Atk. 381; *Scott v. Tyler*, 2 Bro. Ch. 431, 2 White & Tud. Lead. Cas. Eq. 266 et seq.; *Maddox v. Maddox*, 11 Grat. (Va.) 804; *Coppage v. Alexander*, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153, note.

³¹ 2 Min. Insts. 285.

absolute; but in the case of the condition precedent it would not have suffered the legacy to vest until the condition had been performed. The Court of Chancery, therefore, has adopted the civil law only in allowing the legacy to vest in the case of the precedent condition in the last instance, notwithstanding its nonperformance. In all other particulars it has followed its own doctrines; that is, those of the common law.³²

The reason for allowing such an effect to the bequest over is differently stated. Some treat it as an emphatic manifestation of the testator's intent, whilst others consider that it is the interest of the legatee over who takes by way of conditional limitation, which makes the difference; and this latter view seems the better founded.³³

§ 514. Same—C. Legacy Not Given Over upon Marriage. In this case, if the condition is precedent and unreasonably restrictive of marriage, the condition is void and the legacy absolute; otherwise the condition must be observed.³⁴

If the condition be subsequent, it is inoperative in any event to defeat the legacy; for if unreasonably restrictive of marriage it is void, and if not it is deemed merely in terrorem.³⁵

§ 515. Repugnant Conditions. Conditions are repugnant, and therefore void, when they are inconsistent with the legal nature and incidents of the estate granted, to which they are annexed.³⁶

The most usual instances of repugnancy arise in case of conditions, annexed to an estate, (1) not to aliene the estate granted; (2) that it shall not be subject to the grantee's debts; and (3) not to use it in particular ways or for particular purposes. These will be examined in the following sections.³⁷

³² 2 Min. Insts. 286; 1 Th. Co. Lit. 19, note (K); Scott v. Tyler, 2 Bro. Ch. 488, 2 White & Tud. Lead. Cas. Eq. 320; Coppage v. Alexander, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153, note.

³³ 2 Min. Insts. 286; Scott v. Tyler, 2 White & Tud. Lead. Cas. Eq. 320; Lloyd v. Branton, 3 Meriv. 117.

³⁴ 2 Min. Insts. 287; 2 Th. Co. Lit. 19, note (K); 1 Story, Eq. Jur. § 290; Garbut v. Hilton, 1 Atk. 381; Scott v. Tyler, 2 Bro. Ch. 431, 2 White & Tud. Lead. Cas. Eq. 266, 318. See Coppage v. Alexander, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153, note.

³⁵ 2 Min. Insts. 287; 2 Th. Co. Lit. 19 note (K); 1 Story, Eq. Jur. § 288; Scott v. Tyler, 2 White & Tud. Lead. Cas. Eq. 319; Maddox v. Maddox, 11 Grat. (Va.) 804, 810. See Coppage v. Alexander, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153, note.

³⁶ 2 Min. Insts. 287; 2 Th. Co. Lit. 26 et seq.; Hutchinson v. Maxwell, 100 Va. 175, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944.

³⁷ 2 Min. Insts. 287; 2 Th. Co. Lit. 25 et seq.

§ 516. **I. Conditions in Restraint of Alienation—1. Annexed to Grant of Fee Simple—General Rule.** It will be remembered that amongst the incidents which the law generally attaches to fee-simple estates was mentioned an unlimited power of alienation.³⁸ It follows that a condition not to aliene (with certain qualifications, presently to be mentioned), when annexed to the grant of a fee-simple estate, is repugnant to this incident or quality, and for that reason is void.³⁹

Not only is such a condition repugnant to the incident of unlimited power of alienation belonging to an estate in fee simple, but, as Lord Coke observes, it is "absurd and repugnant to reason, that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to aliene. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not aliene, the same is void, because his whole interest or property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic, and bargaining and contracting between man and man; and it is within the reason of our author (Littleton) that it should oust him of all power given to him. *Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem.*"⁴⁰

§ 517. **Same—Qualifications of General Rule—Discussion Outlined.** To the general rule above stated, that conditions annexed to the grant of the fee simple in restraint of alienation are repugnant and void, there are certain qualifications and exceptions to be noted. These are (1) where the restriction is reasonable; (2) where the property is conveyed to a married woman as her equitable

³⁸ Ante, § 151; 2 Min. Insts. 86.

³⁹ 2 Min. Insts. 288, 289; 4 Kent, Com. 131; 2 Jarman, Wills, 13 et seq.; 2 Th. Co. Lit. 25 et seq.; *Hutchinson v. Maxwell*, 100 Va. 175, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944. See *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470, note; *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352. *Hardy v. Galloway*, 111 N. C. 519, 15 S. E. 890, 32 Am. St. Rep. 828; *Mutual Benefit Life Ins. Co. v. Rector, etc., of Grace Church*, 53 N. J. Eq. 413, 32 Atl. 691.

⁴⁰ 2 Th. Co. Lit. 26; 2 Min. Insts. 288; *Hutchinson v. Maxwell*, 100 Va. 175, 176, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944. Indeed, the tendency is adverse to the support of any condition which is merely the result of caprice, and is not calculated to benefit any person or property. *Mitchell v. Leavitt*, 30 Conn. 587; *Barrie v. Smith*, 47 Mich. 130, 10 N. W. 168; *Johnson v. Warren*, 74 Mich. 495, 42 N. W. 74; *Pepin County v. Prindle*, 61 Wis. 301, 21 N. W. 254. Thus a condition requiring the devisee to live in a particular town has been held invalid as merely the result of caprice. *Newkerk v. Newkerk*, 2 Caines (N. Y.) 345.

separate estate; (3) where the grantee is a corporation; (4) where the condition is annexed to a tract other than that conveyed; (5) where the condition is annexed to a bond; (6) where the restriction is in the form of a special limitation ("until" he aliens).

§ 518. **Same—A. Restrictions Reasonable.** According to the better opinion, though, it must be confessed, with strong dissent, a condition annexed to the grant of a fee simple imposing reasonable restrictions upon the grantee's power of alienation is admissible, if the restriction of the power be limited to a reasonable time,⁴¹ or be confined to a few designated persons.⁴² But a condition that the grantee may transfer the estate granted to a certain class of persons only (unless the class constitutes a very large proportion of the community) is by the weight of authority invalid.⁴³

If the condition undertakes to prohibit the transfer by one particular method, as by will, by mortgage, or by deed, the condition is void.⁴⁴

And the condition is equally void whether it seeks to prohibit a voluntary or an involuntary alienation, so that a condition that a fee simple granted shall terminate if the grantee becomes a bankrupt, or if the land has to be sold under order of court upon a judgment against him, is a void condition.⁴⁵

§ 519. **Same—B. Married Woman's Equitable Separate Estate.** Another qualification of the doctrine that conditions restrain-

⁴¹ 2 Min. Insts. 288; 2 Th. Co. Lit. 27, note (R); *Camp v. Cleary*, 76 Va. 140; *Fowlkes v. Wagner* (Tenn. Ch. App.) 46 S. W. 586. Some of the cases distinguish between a vested and a contingent estate, holding that such a restriction is invalid if the estate be vested, but valid if the nonalienation of the estate is a condition precedent to the vesting. See *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Bank of State v. Forney*, 37 N. C. 181; *Anderson v. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470, note.

⁴² 2 Min. Insts. 288; 2 Th. Co. Lit. 27, note (R); *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352. But see 4 Kent, Com. 131; *Barnard's Lessee v. Bailey*, 2 Har. (Del.) 56; *Williams v. Jones*, 2 Swan (Tenn.) 620. See *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470, note.

⁴³ *Gray*, Restraints on Alien. § 41; *In re Rosher*, 26 Ch. Div. 801; *Attwater v. Attwater*, 18 Beav. 330; *Anderson v. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602; *Schermerhorn v. Negus*, 1 Denio (N. Y.) 448; *Morse v. Blood*, 68 Min. 442, 71 N. W. 682. But see *Doe v. Pearson*, 6 East, 173; *In re Macleay*, L. R. 20 Eq. 186.

⁴⁴ *Gray*, Restraints on Alien. § 55 et seq.; *In re Rosher*, 26 Ch. Div. 801; *Ware v. Cann*, 10 B. & Cr. 433. See *Cushing v. Spalding*, 164 Mass. 287, 41 N. E. 297.

⁴⁵ 2 Min. Insts. 290; *In re Dugdale*, 38 Ch. Div. 176; *Hahn v. Hutchinson*, (420)

ing the alienation of a fee simple are void is to be found in the case of the wife's equitable separate estate. Any restrictions imposed upon her by the terms of the settlement, either as to the time or mode of transfer of the property or as to the anticipation of the income accruing therefrom, will in general be sustained and enforced by the courts of equity.⁴⁶

§ 520. **Same—C. Restriction upon Alienation by a Corporation Grantee.** The condition not to aliene, attached to a grant of land to a corporation, is admissible, apparently because, corporations being created, and being allowed to acquire lands, for corporate purposes only, it is not only not contrary to, but it is entirely consonant with, public policy, and with what ought to have been the intention of the parties, to impose restrictions limiting the use of lands purchased to the corporations only, and prohibiting alienation. Thus, a condition annexed to land granted to New York City, that it should be used exclusively as a public square, was held to be valid, and the land to be forfeited upon the nonobservance thereof. So, also, in case of a condition annexed to a conveyance to a railroad company, or for a church, a schoolhouse, and a townhouse, respectively.⁴⁷

§ 521. **Same—D. Restriction Annexed to Tract Other than That Granted.** The ground upon which conditions in restraint of alienation are declared void is that such conditions contained in a deed or other instrument are inconsistent with and repugnant to the estate created by the same instrument.⁴⁸

But this principle does not apply where the condition is annexed to another tract than that granted by the instrument containing the condition, for no inconsistency or repugnancy is thereby created between the different parts of the instrument. Hence such a condition is valid; so that, if the grantee aliene contrary to its provisions, the estate granted is avoided. Thus, if Z. be seised of Black-Acre in fee, and A. grants White-Acre to him upon con-

159 Pa. 133, 138, 28 Atl. 167; *Van Osdel v. Champion*, 89 Wis. 661, 62 N. W. 539, 27 L. R. A. 773, 46 Am. St. Rep. 864; *McCleary v. Ellis*, 54 Iowa, 311, 6 N. W. 571, 37 Am. Rep. 205.

⁴⁶ 2 Min. Insts. 649, 927; *Gray*, *Restraints on Alien*, § 125; 2 *Perry*, *Trusts*, § 671; *Buggett v. Meux*, 1 *Phillips*, 627; *In re Currey*, 32 Ch. Div. 361; *Hutchinson v. Maxwell*, 100 Va. 176, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944; *Lee v. Bank of United States*, 9 *Leigh* (Va.) 209; *Wells v. McCall*, 64 Pa. 207.

⁴⁷ 2 Min. Insts. 288, 289; *Stuyvesant v. Mayor, etc., of City of New York*, 11 *Paige* (N. Y.) 414; *Pennsylvania R. Co. v. Parke*, 42 Pa. 31; *Grissom v. Hill*, 17 *Ark.* 483; *Warner v. Bennett*, 31 *Conn.* 468; *Attorney General v. Merrimack Mfg. Co.*, 14 *Gray* (Mass.) 586; *French v. Inhabitants of Quincy*, 3 *Allen* (Mass.) 9.

⁴⁸ *Ante*, § 515.

dition that Z. shall not aliene Black-Acre, the condition is good, and, if not observed, will defeat the grant of White-Acre.⁴⁹

§ 522. **Same—E. Condition Not to Aliene Land Annexed to a Bond.** Here, also, as in the preceding case, there is no repugnancy to the estate granted, and, according to Lord Coke, the condition not to aliene, contained in a bond, is therefore valid; for, says he, "he may, notwithstanding, aliene, if he will forfeit his bond that he himself hath made."⁵⁰

By parity of reason it would seem that if the restraint upon alienation takes the form of a covenant in the deed passing the land, instead of a condition, the covenant would be valid, and an action for damages might be maintained for the breach of it, though a valid title would pass by such alienation.⁵¹

§ 523. **Same—F. Restraint upon Alienation in Form of Special Limitation.** If the restraint upon alienation be in the form of a special limitation, as "to A. until he alienes," there would seem to be no reason to doubt the validity of such a limitation, any more than a similar limitation, until the grantee marries. They both depend upon the same principle, namely, that there is nothing to give an interest beyond the event named, so that, upon the happening of the event, the estate is ipso facto determined.⁵²

§ 524. **Same—2. Condition Restraining Alienation Annexed to a Fee Tail.** If the condition be not to aliene in the manner prescribed by law, e. g., formerly by fine or recovery, and since the statute 3 & 4 Wm. IV, c. 74 (A. D. 1833), by deed enrolled in chancery, it is repugnant and void. Otherwise the condition is good; because the alienation of an estate tail, save in the manner prescribed, is not in accordance with law.⁵³

§ 525. **Same—3. Condition Restraining Alienation Annexed to Estates for Life or Years.** Freedom of alienation is not one of the incidents of an estate for life or for years, as it is of an estate in fee simple; nor could it be without sometimes endangering seriously the interests of him in reversion or remainder.

⁴⁹ 2 Min. Insts. 289; 2 Th. Co. Lit. 27.

⁵⁰ 2 Th. Co. Lit. 25; 2 Min. Insts. 289; *Freeman v. Freeman*, 2 Vern. 234. But see *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470, note.

⁵¹ See *Supervisors of Bedford County v. Bedford High School*, 92 Va. 292, 23 S. E. 299.

⁵² Ante, § 479; 2 Min. Insts. 289, 285; *Hutchinson v. Maxwell*, 100 Va. 177, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944; *Scott v. Tyler*, 2 Bro. Ch. 431, 2 White & Tud. Lead. Cas. Eq. 321; 2 Jarman, Wills, 13, note 1, 24, note 1, 855. But see 2 Tiffany, Real Prop. § 500; *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470, note; *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352.

⁵³ 2 Min. Insts. 290; 2 Th. Co. Lit. 30, 31.

There is, therefore, no repugnancy in a condition prohibiting it, and such a condition is valid wherever it is needful in order to guard the rights of the reversioner or remainderman. Still the free alienation of all manner of property is so important to the well-being of the community that conditions of this sort are not favored in law, but are construed strictly in favor of the lessee, and are, therefore, not carried further than their terms require. Hence a condition not to assign a lease does not affect an assignee to whom the term had been transferred with the lessor's consent; nor, if the condition were that the lessee himself should not assign, would it apply to his personal representative; nor, it is said, would it prohibit a devise of the term, because a devise is not a lease (but is it not an assignment?); nor would it prevent an underlease; nor would it be a bar to taking the lease in execution (the assignment contemplated being a voluntary one), unless the judgment were had by collusion, in order to bring about a sale.⁵⁴

It should be observed, however, that there are not wanting cases which affirm that perfect freedom of alienation is a necessary incident, not of estates in fee simple only, but of all estates, and that no condition restricting it, except to a very limited extent, is in any case valid, even though annexed to an estate for life or years. These cases, however, are in general, if not always, cases of wills, where a condition of nonalienation, or of nonliability for the payment of debts, was annexed to the devise of a first estate for life, with remainder over, but not with the design to protect the rights of the remainderman or of any reversioner. And although the language of the judges in deciding them is indiscriminately applicable to all estates for life, yet they do not seem to have had in mind at all the instance of a lease for life or years, where the power to restrict or even to prohibit alienation or assignment is indispensable in order duly to secure the lessor against irreparable injury to his reversion. Indeed, the attention of the court in all of them seems to have been principally directed to the enforcing of the just distinction, especially as it regards nonliability for debts, between limitations and conditions.⁵⁵

⁵⁴ 2 Min. Insts. 291; 4 Kent, Com. 131, note 1; 2 Th. Co. Lit. 29, note (T); Pennant's Case, 3 Co. 64 a; Dumpor's Case, 4 Co. 119 b, 1 Smith L. C. 74, 80, et seq.; Mildmay's Case, 6 Co. 43 a; More's Case, Cro. (Eliz.) 331; Doe v. Carter, 8 T. R. 60, 61, 301; Weatherall v. Geering, 12 Ves. 511; Brummell v. McPherson, 14 Ves. 173, 175, 176; Doe v. Watt, 8 B. & Cr. 308; Croft v. Lumley, El. Bl. & El. 1069 et seq.; Shaw v. Coffin, 14 C. B. N. S. 372.

⁵⁵ 2 Min. Insts. 291; Brandon v. Robinson, 18 Ves. 429; Graves v. Dolphin, 1 Sim. 66; Rochford v. Hackman, 9 Hare, 475; Dickson's Trust, 1

It is submitted that the true principle (leaving out of view the distinction between a condition and a limitation) is, as stated above, that a condition restrictive of alienation is always to be regarded as adverse to public policy, and for that reason to be strictly construed, and when it is not needful in order to protect the reversionary interests of the grantor, or of the person from whom the estate or interest proceeds, it is in general void.⁵⁶

§ 526. II. Repugnant Condition That Land Granted shall Not be Liable to Grantee's Debts. Such a condition is in general repugnant and void; that is, a man cannot possess property which, whilst his estate continues, shall not be liable to his debts. But any attempt to subject the property to his debts may be made the event or condition upon which his interest shall cease. It is to be observed, also, that the same distinction applies here as in the preceding case, between a condition and a limitation.⁵⁷ Thus a grant of property to A. until he becomes bankrupt, and then over, is allowable; and so, also, is a grant until the commission of an act of bankruptcy, and then over, it being apparently required, even for the validity of such a special limitation, at least by the English decisions, that the estate should, upon the subjection of it to debts, go over to another.⁵⁸

A condition in a lease for years that the lessor shall re-enter, or that the lease shall otherwise come to an end, upon the tenant's committing an act of bankruptcy, or the term's being taken in execution, is valid, although it could not be screened by condition from his debts whilst it continued his property.⁵⁹

Sim. N. S. 37; *Mebane v. Mebane*, 39 N. C. 131, 44 Am. Dec. 102; *Camp v. Cleary*, 76 Va. 140; *Hutchinson v. Maxwell*, 100 Va. 176, 177, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944.

⁵⁶ 2 Min. Insts. 292. See *Hutchinson v. Maxwell*, 100 Va. 176, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944.

⁵⁷ 2 Min. Insts. 290; *In re Dugdale*, 38 Ch. Div. 176; *Hutchinson v. Maxwell*, 100 Va. 176 et seq., 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944; *Honaker v. Duff*, 101 Va. 675, 44 S. E. 900; *Hahn v. Hutchinson*, 159 Pa. 133, 138, 28 Atl. 167; *Van Osdel v. Champion*, 89 Wis. 661, 62 N. W. 539, 27 L. R. A. 773, 46 Am. St. Rep. 864; *McCleary v. Ellis*, 54 Iowa, 311, 6 N. W. 571, 37 Am. Rep. 205.

⁵⁸ 2 Min. Insts. 290; *Gray, Restraints on Alien.* § 134; 2 Story, Eq. Jur. § 974a; *Foley v. Burnell*, 1 Bro. Ch. 274; *Brandon v. Robinson*, 18 Ves. 433; *Graves v. Dolphin*, 1 Sim. 67; *Rochford v. Hackman*, 9 Hare, 475; *Hutchinson v. Maxwell*, 100 Va. 176, 177, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944; *Hallet v. Thompson*, 5 Paige (N. Y.) 585.

⁵⁹ 2 Min. Insts. 292; *Brandon v. Robinson*, 18 Ves. 433; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Garland v. Garland*, 87 Va. 758, 13 S. E. 473, 13 L. R. A. 212, 24 Am. St. Rep. 682; *Hutchinson v. Maxwell*, 100 Va. 176, 177, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944; *Bull v. Kentucky Nat. Bank*, 90 Ky. 452, 14 S. W. 425, 12 L. R. A. 37.

§ 527. **III. Repugnant Conditions Restricting Use of the Premises Granted.** Conditions restricting the use of the premises in a reasonable manner, annexed to estates for life or for years, are for the benefit of the reversioner or remainderman, and are not repugnant to the estate granted; the absolute and uncontrolled use of the premises not being an incident of such estates implied by law.⁶⁰

And even upon a grant of the fee simple, such reasonable conditions restraining the grantee's use and enjoyment of the premises as may be necessary to protect the adjacent lands or the business of the grantor from injury may be annexed to the grant and will be sustained; as in case of a condition against the use of the property for a particular business, such as the sale of liquor,⁶¹ or in case of a reasonable condition requiring the property to be used or improved in a particular way, as by the erection of a dwelling at a minimum cost, etc.⁶²

But conditions annexed to a fee-simple estate, restricting the grantee unreasonably, and without benefit to the grantor, in the use he may make of the land granted, are repugnant and void. Of such kind is a condition that the grantee shall not take the profits of the land, or that he shall lease it at a named rent, or that he shall not lease it at all, or that he shall cultivate it in a certain manner,⁶³ or that no window shall be placed in a house.⁶⁴

Indeed, as has been before remarked, the tendency is to hold that any condition which is merely the result of unreasonable whim or caprice is obnoxious, as not being calculated to benefit any person or property.⁶⁵

§ 528. **Relief in Equity against Forfeiture for Breach of Condition—I. General Principle of Equitable Intervention.** The true ground of relief in equity against forfeitures is found in the original intent of the parties, where the penalty or forfeiture is designed only to secure the performance of some act, whether it be a col-

⁶⁰ Ante, §§ 194, 329.

⁶¹ 2 Min. Insts. 292; *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Collins Mfg. Co. v. Marcy*, 25 Conn. 242; *Smith v. Barrie*, 56 Mich. 314, 22 N. W. 816, 56 Am. Rep. 391; *Sioux City & St. P. R. Co. v. Singer*, 49 Minn. 301, 51 N. W. 905, 15 L. R. A. 751, 32 Am. St. Rep. 554.

⁶² *Langley v. Chapin*, 134 Mass. 82; *Allen v. Howe*, 105 Mass. 241; *Southard v. Central R. Co. of New Jersey*, 26 N. J. Law, 13; *Hammond v. Port Royal & A. Ry. Co.*, 15 S. C. 10.

⁶³ 1 *Tiffany*, Real Prop. § 70; *Co. Lit.* 206b; 2 *Jarman*, Wills, 854; 2 *Cruise*, Dig. Tit. 13, c. 1, §§ 20, 21; *Smith v. Clark*, 10 Md. 186.

⁶⁴ *Gray v. Blanchard*, 8 Pick. (Mass.) 284.

⁶⁵ 1 *Tiffany*, Real Prop. § 70; *Mitchell v. Leavitt*, 30 Conn. 587; *Barrie v. Smith*, 47 Mich. 130, 10 N. W. 168; *Johnson v. Warren*, 74 Mich. 495, 42 N. W. 74; *Pepin County v. Prindle*, 61 Wis. 301, 21 N. W. 254.

lateral act or to pay money, and the court can give the party, by way of recompense, all that he ought to have expected or desired.⁶⁶

§ 529. Same—II. In Case of Condition to Pay Money. If the condition be the payment of money, compensation may always be made to the disappointed performee by the payment to him of the principal sum, with interest from the date it falls due. Hence equity always relieves upon the offer to pay the money, with interest, within a reasonable time after default; the penalty or forfeiture being attended with no other design than to secure the payment.⁶⁷

It may be observed that equity distinguishes between a promise to pay more, if a stipulation be not observed (which it denominates a penalty, and will relieve against), and a remission of a part, if a stipulation be fulfilled, which it regards as not obnoxious to a similar objection. And yet it is obvious that the same result may be attained by the latter means as is condemned in the former. Thus, if a bond bind the obligor to pay \$100 in twelve months, and if it be not punctually paid, with interest from the date, this latter stipulation is a penalty, and cannot be enforced; the interest accruing only from the expiration of the year. But if the bond were to pay in twelve months \$100, with interest from the date, and if the principal be punctually paid, the interest to be remitted, the debtor can entitle himself to a remission of the interest only by paying the principal punctually.⁶⁸

If the condition be the payment of rent, equity will frequently intervene to prevent a forfeiture where the lessee neglects to pay his rent at the time specified, whereby a right of re-entry accrues to the lessor, or the lease is in such contingency absolutely avoided; and the principle has even been applied by a court of law, by a rule to stay proceedings, upon payment or tender of the rent.⁶⁹

§ 530. Same—III. In Case of Condition to Do a Collateral Thing. Compensation is by no means universally possible in case

⁶⁶ 2 Min. Insts. 298; *Peachy v. Somerset*, 1 Stra. 447, 2 White & Tud. Lead. Cas. Eq. 448; *Sloman v. Walker*, 1 Bro. Ch. 418, 2 White & Tud. Lead. Cas. Eq. 448, 456, et seq.

⁶⁷ 2 Min. Insts. 299; *Peachy v. Somerset*, 1 Stra. 447, 2 White & Tud. Lead. Cas. Eq. 457 et seq.

⁶⁸ 2 Min. Insts. 299, 300. See *Nicholls v. Maynard*, 3 Atk. 521; *Bonafous v. Rybot*, 3 Burr. 1370; *Gowlett v. Hansforth*, 2 W. Bl. 958; *Waller v. Long*, 6 Munf. (Va.) 78; *Richardson v. Campbell*, 34 Neb. 181, 51 N. W. 753, 33 Am. St. Rep. 633; *Moumouth Park Ass'n v. Wallis Iron Works*, 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626.

⁶⁹ 2 Min. Insts. 300; *Goodtitle v. Holdfast*, 2 Stra. 900; *Anon*, 1 Wils. 75.

of conditions to do collateral things, and when the performee of the condition cannot be put into a plight essentially the same, or at least as advantageous, as if the condition had been punctually performed, equity does not interpose. Hence a breach of the condition by assigning the premises without license, by the tenant's neglecting to repair, by omitting to keep the premises insured, by adopting a prohibited course of husbandry, or by exercising a forbidden trade on the premises, will in none of these cases be relieved against in equity, because there is no known measure of damages whereby the breach may be compensated. Neither will equity interpose to grant relief against forfeitures of shares in public works for nonpayment of calls, from considerations of public policy connected with the necessity of punctuality in such cases; nor where the forfeiture is exacted by a statute, nor in pursuance of a condition in law.⁷⁰

It should be observed that, whilst equity will give a person relief against a penalty, where it is only intended to secure the performance of a stipulation, so, on the other hand, it will not permit him to elect to pay the penalty, and so evade the specific execution of the contract, unless the alternative was contemplated.⁷¹

§ 531. **Same—IV. Condition to Pay Stipulated Damages.** The parties may fix their own measure of damages for the breach of any stipulation between them, provided they appear to have made an actual estimate, in good faith, of the loss which will accrue in the contingency contemplated. In that case equity will not interfere to prevent the performee from enforcing the payment of the full sum agreed on, which is, in no sense, a penalty in order to secure performance, but the true measure of damage occasioned by nonperformance. But it is not enough, in order to make the damages liquidated and recoverable *eo numero*, that they should be so denominated by the parties. Although said to be liquidated, yet if the exorbitance of the estimate, or any other circumstance, shall satisfactorily demonstrate that really no actual and bona fide computation was made of the loss which would result from the breach of the contract, the sum named is a penalty, and not liquidated damages. Amongst other circumstances which refute the idea of any real computation, and therefore of the damages being truly liquidated, is the fact that the stipulations are several, and an aggregate sum is named; for it is impossible that the same sum can be at once a compen-

⁷⁰ 2 Min. Insts. 300, 301; *Peachy v. Somerset*, 1 Stra. 447, 2 White & Tud. Lead. Cas. Eq. 465; *Ewing v. Litchfield*, 91 Va. 576, 22 S. E. 362.

⁷¹ 2 Min. Insts. 301; *Peachy v. Somerset*, 1 Stra. 447, 2 White & Tud. Lead. Cas. Eq. 465; *Ewing v. Litchfield*, 91 Va. 576, 22 S. E. 362.

sation for the breach of all the stipulations, and of each one separately.⁷²

If the condition be construed to be a penalty, a court of equity will interfere to prohibit either the enforcement of the penalty by the one party or the evasion of performance by the other by voluntary payment of the penalty. But if the condition is construed to be stipulated or liquidated damages, the jurisdiction of equity ceases.⁷³

⁷² 2 Min. Insts. 301; *Peachy v. Somerset*, 1 Stra. 447, 2 White & Tud. Lead. Cas. Eq. 469.

⁷³ *Ewing v. Litchfield*, 91 Va. 576, 22 S. E. 362.

CHAPTER XXIII.

MORTGAGES.

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§ 532. **Incumbrances for Purposes of Security.** There are some further qualifications of estates in land, arising by way of lien or incumbrance. These may be divided into two great classes: (1) Those incumbrances which are created by act and contract of the parties; and (2) those which arise by operation of law—i. e., by express statutory enactment, or by an implication of intention drawn from the acts of the parties.

To the first class belong mortgages and deeds of trust to secure debts. The use of deeds of trust to secure debts is so locally restricted that its particular consideration is beyond the scope of this work.

To the second class belong judgment liens and the liens of mechanics and materialmen, and others of like character, all of which owe their existence to local statutes. The consideration of these statutory liens is also beyond the scope of our work. But those liens which arise by implication of law, being founded on principles of equity whose existence is everywhere acknowledged, however much there may be a lack of uniformity in their application, demand our attention.

While the purpose of all statutory and implied liens on land is to secure the payment of money, that of a mortgage may be to secure either the payment of money or the doing of some collateral thing.

§ 533. **Mortgages in the United States.** In this country, mortgages are divided into two great classes: (1) Common-law, or legal, mortgages, and (2) lien theory mortgages. To which of these

classes a mortgage belongs depends upon the law of the state in which the mortgaged property is situated.

While the nature of a mortgage under one theory differs essentially from that under the other, the object is the same under either theory, and, so far as their different natures permit, the equitable principles applied in adjusting the rights of the different persons interested are common to both.

§ 534. **Nature of a Mortgage—I. Under the Common-Law Theory.** 1. **The Mortgagee's Estate.** A mortgage is a conveyance of property on condition to be void if a sum of money be paid, or a collateral thing be done, by a designated time. The estate of the mortgagee is one on condition subsequent. The performance of the condition divests the mortgagee of his estate and restores the right of possession to the mortgagor without the necessity of a reconveyance. Until the performance of the condition, the mortgagee is entitled to the possession of the land as the legal owner. But if default be made in payment of the debt or in performance of the collateral thing to be done, so that it is now impossible to perform the condition, the estate of the mortgagee at once becomes absolute.¹

The name mortgage (equivalent to the Latin *mortuum vadium*), is said by Littleton and Coke to be given to this security because if the grantor (the debtor) does pay, the land is dead to the creditor, and if he does not pay, it is dead to himself.²

§ 535. **Same—2. Equity of Redemption.** It is not clearly ascertained when the equity of redemption was first allowed. As Lord Coke makes no mention of it, it may be presumed not to have been generally acknowledged at the period of the publication of his first Institute, the commentary upon Littleton, which was in 1621; but in the first year of the reign of Charles II (A. D. 1660), we

¹ 2 Min. Insts. 332; 2 Th. Co. Lit. 34; 2 Bl. Com. 158.

The notion of mortgages, and of the redemption thereof, seems to have been derived from the civil or Roman law, which distinguished between a pledge or pawn (*pignus*) on the one side (where the possession passed to the creditor), and a *hypotheca* on the other (where it remained with the debtor). In the latter case, if the money be not paid, the creditor is obliged to obtain a judicial sentence before the property of the subject is vested in him, and meanwhile it is liable to redemption, which idea, derived from the civil law, seems to have aided in suggesting that right to redeem which the courts of equity have for over two centuries enforced in respect to mortgages.

The name mortgage (equivalent to the Latin *mortuum vadium*) is said by Littleton and Coke to be given to this security because, if the grantor (the debtor) does pay, the land is dead to the creditor, and, if he does not pay, it is dead to himself. 2 Min. Insts. 332.

² 2 Min. Insts. 332; 2 Th. Co. Lit. 34.

find the right supported as a thing of course. It must, therefore, have been established during the period of the Commonwealth or temp. Charles I, or in the latter years of James I.³

An equity of redemption is defined to be an equitable right inherent in the land (a title in equity, and something more than merely a trust), which binds all persons, whereby, although the condition be not strictly performed, so that the estate is forfeited at law, yet if the debtor pay the money, with interest, within a reasonable time, he is entitled in equity to call on the creditor for a reconveyance of the land. The mortgagor is thus enabled to constrain the mortgagee, who has possession of his estate, to deliver it back, and account for the rents and profits received, on payment of his whole debt and interest, thereby, as Blackstone observes, turning the mortuum into a kind of vivum vadium.⁴

On the other hand, the mortgagee, as soon as default is made, may call upon the mortgagor in equity to redeem his estate presently, or else in default thereof, to be forever foreclosed from redeeming the same: that is, to lose his equity of redemption without possibility of recall.⁵

The reason for the allowance of the equity of redemption is to be found in the general maxim of the courts of equity, that penalties and forfeitures are always to be relieved against when the substantial object in view can be attained, and the other party put essentially in statu quo, without enforcing them. It is obvious that a mortgage is meant only as a security for the money, and that if, within a reasonable time, although not within the time limited, the money be paid with interest, the object of the transaction is substantially attained, and the creditor ought to be satisfied.⁶

§ 536. Same—3. Equity of Redemption Inseparably Incident to Every Mortgage. The right of redemption is so carefully guarded by courts of equity that they will suffer no agreement in a mortgage deed to prevail whereby the right to redeem is waived, and the estate is to become an absolute purchase in the mortgagee upon any event whatever. If it can be discerned, or proved by parol, that the estate was intended as a security for money, it is a mortgage, and without regard to stipulations to the contrary, it has inseparably incident to it an equity of redemption. Nor is this right to redeem confined to the mortgagor, and persons in privity with

³ 2 Min. Insts. 335; 2 Story, Eq. Jur. § 1014.

⁴ 2 Min. Insts. 334, 335; 2 Bl. Com. 159; 2 Th. Co. Lit. 32, note (Z); Reeve v. Atty. Gen., 3 Atk. 223; Tucker v. Thurston, 17 Ves. 133.

⁵ 2 Min. Insts. 335; 2 Bl. Com. 159.

⁶ 2 Min. Insts. 335; 2 Story, Eq. Jur. § 1013 et seq.

him, as his heirs, personal representatives, and assignees, but it extends also to subsequent incumbrancers, and to all persons claiming any interest whatever in the premises, as against the mortgagor. Hence a person claiming under a deed voluntary, and therefore void as against a subsequent mortgagee, may redeem, for the voluntary deed is binding on the mortgagor. A fortiori, may one claiming for valuable consideration, as tenant under the mortgagor, or a judgment creditor, or a tenant by elegit, or a tenant by the curtesy, or in dower.⁷

It is a wholesome and well-known general rule of evidence to exclude verbal testimony to contradict or alter any writing, yet notwithstanding it is allowed, as said above, to prove by parol that a conveyance absolute on its face was in fact intended only as a security for money; that is, as a mortgage, with the inevitable concomitant of an equity of redemption. It is admitted, however, that the evidence, in order thus to refute the express terms of the deed, must be clear, and the proof cogent. For this acknowledged exception to the general rule, several reasons are given, as (1) that a mistake has been made, or else a fraud committed in carrying out the intention of the parties, by making the conveyance absolute instead of conditional, and that it is a peculiar function of a court of equity to correct such mistakes; (2) that the admission of parol evidence in such cases is necessary in order to prevent oppression and fraud on the part of creditors; and (3) that the equity to redeem incident to a mortgage is analogous to, or rather is itself, a resulting trust, which has always been allowed to be established by verbal testimony.⁸

§ 537. Same—4. Equity of Redemption an Estate in the Land.

An equity of redemption, as we have seen, is a mere creature of a court of equity, founded on the principle that, as a mortgage is only a pledge to secure money, it is but natural justice, and is, moreover, the substance of the transaction, to consider the ownership of

⁷ 2 Min. Insts. 335, 336; 2 Th. Co. Lit. 40, note (Z); *Howard v. Harris*, 1 Vern. 190, 2 White & Tud. Lead. Cas. Eq. 415 et seq., 430 et seq.; *James v. Oades*, 2 Vern. 402; *Toomes v. Slade*, 7 Ves. 273; *Ross v. Norvell*, 1 Wash. (Va.) 14, 1 Am. Dec. 422.

⁸ 2 Min. Insts. 336; *Thornbrough v. Baker*, 2 White & Tud. Lead. Cas. Eq. 418, 431; *Joynes v. Statham*, 3 Atk. 389; *Dixon v. Parker*, 2 Ves. Sr. 225; *Sprigg v. Bank of Mt. Pleasant*, 14 Pet. 201, 10 L. Ed. 419; *Balcock v. Wyman*, 19 How. 299, 15 L. Ed. 644; *Ross v. Norvell*, 1 Wash. (Va.) 14, 1 Am. Dec. 422; *Robinson v. Willoughby*, 65 N. C. 520; *Phillips v. Croft*, 42 Ala. 477; *Klinik v. Price*, 4 W. Va. 4, 6 Am. Rep. 268; *Edrington v. Harper*, 3 J. J. Marsh. (Ky.) 355, 20 Am. Dec. 145; *Prince v. Bearden*, 1 A. K. Marsh. (Ky.) 170; *Henry v. Davis*, 7 Johns. Ch. (N. Y.) 40; *Van Buren v. Olmstead*, 5 Paige (N. Y.) 9.

the land as still vested in the mortgagor, subject only to the mortgagee's legal title, so far as needful for his security. It is something more than a mere trust, being inherent in the land, and binding all persons, whether they come in in the post, or otherwise. Whilst the mortgagor, entitled to an equity of redemption, is in possession of the land, he is deemed, in nearly every jurisdiction in this country, to be seised thereof as against all persons whomsoever but the mortgagee and his assigns, so that until the mortgagee assert his right of possession, or foreclose the equity of redemption, the mortgagor's interest is subject to all the incidents of a legal estate, including dower and curtesy, and may be levied upon and sold for the mortgagor's debts.* And a striking illustration of the legal phase of this double-faced interest, which from one point of view is a complete legal estate, from the other, a mere equity, is the right of the mortgagor to maintain an action of ejectment (which must be based on a legal title) against third persons.⁹

⁹ 1 Jones, Mortgages, §§ 11, 15; Wilkins v. French, 20 Me. 111; Cooper v. Davis, 15 Conn. 556.

¹⁰ Woods v. Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513.

Mortgage (Mortuum Vadium) Distinguished from Vivum Vadium. Glanville, in the time of Henry II (about A. D. 1170), describes two kinds of pledges as then existing, namely, one where the seisin of the lands has been delivered to the creditor for a definite term, and it has been agreed that the proceeds and rents shall in the meantime reduce the debt; and the other, where the seisin has been in like manner delivered for a definite term, but the fruits and rents received in the interval in no measure tend to reduce the demand. To the former transaction he assigns no name, but it seems to have been well enough known to the law of Normandy by the designation of *vivum vadium*. The latter he calls mortgage (*mortuum vadium*), and characterizes it as an unjust and dishonest agreement, although not prohibited by the king's court. 2 Min. Insts. 331.

Vivum vadium is described by Lord Coke as where a man borrows £100 of another, and maketh an estate of lands to him until he hath received the said sum of the issues and the profits of the land; so as in this case neither money dieth nor land is lost, and therefore it is called *vivum vadium*. 2 Th. Co. Lit. 34; 2 Min. Insts. 331; 2 Bl. Com. 157. There is another transaction quite similar to the ancient *vivum vadium*, not unknown in England at the present day, termed a "Welsh mortgage," the peculiarity of which is that upon default the mortgagee does not take the mortgaged land absolutely, but only until out of the rents and profits thereof he may reimburse himself for the principal and interest of the debt. See post, § 550; 2 Min. Insts. 357, 358.

Mortgage Distinguished from Pledge or Pawn. The difference between a pledge or pawn and a mortgage is twofold: (1) A pledge is necessarily chattel property, or movables alone; a mortgage may be either of personal or real estate. (2) A pledge passes only a special property to the pawnee, the general property remaining still with the pawner, but with the privilege to the pawnee to sell at auction, if the money be not paid upon giving reasonable opportunity

§ 538. **Same—II. Under the Lien Theory.** In many of the states of this country, the character of a mortgage has been essentially changed by doing away with the mortgagee's legal estate, with his consequent right of possession of the land. This reduces the mortgage to a mere lien, or right to have the specific property mortgaged sold and the proceeds applied to the payment of the debt. The mortgagee has no estate in the land either at law or in equity. One result of this is that, after default, the mortgagee cannot become the absolute owner of the property by a strict foreclosure, cutting off the equity of redemption; for prior to default he had no defeasible estate which could be made absolute.¹¹ Another result is that payment after default (as well as before) destroys the lien, for no lien can exist without a debt, and therefore no reconveyance of the land is necessary; whereas under the common-law theory, if payment were made after default, a reconveyance is necessary, for the legal estate in the mortgagee has become absolute at law.¹² The mortgagor has the right to pay the debt when it becomes due and at any time before a consummated sale under foreclosure, and this right will be protected in equity. This right to pay the debt and discharge the lien is called (but not with technical accuracy) an "equity of redemption"; and the same term is often (and still more inaccurately) applied to the estate of the mortgagor in the land.¹³

§ 539. **Mortgage Implies Personal Liability Also on Part of Mortgagor.** It is worthy to be noted that for the most part every pledge implies a debt, and therefore an action lies on a mortgage to recover the money thereby sought to be secured, unless it be stipulated that the recourse shall be to the subject mortgaged alone. Hence, where the subject, being personalty, is lost or destroyed without the default of the mortgagee, he may still recover the money, by an action against the mortgagor. And this is equally true, whether there be a promise to pay contained in the mortgage or not; but that

to the debtor to redeem, and apprising him of the time and place of sale; a mortgage vests a legal title conditionally in the mortgagee, and if the condition be not performed by the payment of the money at the time stipulated, the title becomes absolute at law, although equity in modern times will compel the allowance of a right of redemption. 2 Min. Insts. 332; 4 Kent, Com. 138.

¹¹ *Fletcher v. Holmes*, 32 Ind. 497; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638; *Smith v. Gardner*, 42 Barb. (N. Y.) 356; *Triumm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623; *Edrington v. Newland*, 57 Tex. 627; *Jordan v. Sayre*, 29 Fla. 100, 10 South. 823; *Waterson v. Devoe*, 18 Kan. 223.

¹² 2 Jones, Mortgages, § 889; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; *Robinson v. Leavitt*, 7 N. H. 73.

¹³ 2 Washburn, Real Prop. (6th Ed.) § 1045.

circumstance may make a difference in the action proper to be brought, and in the application of the statute of limitations.¹⁴

And so a change in the evidence of the debt does not discharge the mortgage. A mortgage secures the debt and not merely the note or bond or other evidence of it. No change in the form of the evidence, or the mode or time of payment—nothing short of the actual payment of the debt, or an actual release—will operate to discharge the mortgage.¹⁵

Thus the fact that the creditor obtains a judgment for the debt in a court of law does not discharge the mortgage, or other lien;¹⁶ nor does the taking of a new bond;¹⁷ nor even the surrender or cancellation of the bond taken at the time the debt was contracted, unless such is the manifest intent, for the bond is merely one of the two securities of the creditor, to either of which he may resort at pleasure, but both of which are distinct from the debt itself.¹⁸ Indeed, the lien securing the debt continues to exist until it is clearly shown that it has been waived, released or satisfied, the burden of proving which is on the party alleging it.¹⁹

But if the land subject to the mortgage be conveyed by the mortgagor, the purchaser, in the absence of an agreement by him to assume the mortgage, is not liable personally to pay the mortgage, since it is not his debt, but the land in his hands is liable, he having purchased it subject to the mortgage (supposing him to have notice thereof); but the mortgagor still remains personally liable as before. If, however, the purchaser expressly assumes the payment of the mortgage as part of the consideration for the conveyance to him, while this does not, without the consent of the mortgagee, release the mortgagor altogether, it makes him responsible only subsidiarily, as surety, and the mortgagee is the principal debtor.²⁰

§. 540. Mortgage Distinguished from a Conditional Sale. A conditional sale is not a security for money, but is what its designa-

¹⁴ 2 Min. Insts. 333, 334; Bac. Abr. Bailment (B); *King v. King*, 3 P. Wms. 360; *Coggs v. Bernard*, 2 Ld. Raym. 917; *Raynolds v. Carter*, 12 Leigh (Va.) 170, 37 Am. Dec. 642.

¹⁵ 2 Min. Insts. 334; *Gibson v. Green*, 89 Va. 524, 16 S. E. 661, 37 Am. St. Rep. 888, note; *Hadlock v. Bulfinch*, 31 Me. 246; *Boyd v. Beck*, 29 Ala. 703.

¹⁶ *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531, 1 L. R. A. 639; *Cary v. Prenziss*, 7 Mass. 63.

¹⁷ *Carper v. Marshall*, 98 Va. 438, 36 S. E. 526; *Boswell v. Goodwin*, 31 Conn. 74, 81 Am. Dec. 169.

¹⁸ *Coles v. Withers*, 33 Grat. (Va.) 186.

¹⁹ 2 Washburn, Real Prop. (6th Ed.) § 1119.

²⁰ *Fiske v. Tolman*, 124 Mass. 254, 20 Am. Rep. 659; *Merriman v. Moore*, 90 Pa. 78; *Ross v. Kennison*, 38 Iowa, 396.

tion imports, namely, a sale in good faith, and a sale on condition that the vendor may repurchase on certain terms, which must be strictly complied with. Of course, therefore, no equity of redemption is incident to such a sale, because, as it is not the design of the transaction to secure the payment of money, a court of equity has no ground to say the substantial object can as well be reached by the payment at a subsequent time, with interest, as by a prompt compliance with the condition; nor does it follow that the party can thereby be put in statu quo.²¹

As a conditional sale has no equity of redemption incident to it, the attempt is not unfrequently made to give to what is really in purpose and intent a mortgage, the aspect of a conditional sale; and as the terms in which they are conceived are very similar, it is usually requisite to resort to parol evidence, extrinsic to the deed creating the estate, to determine the true character of the transaction. If, upon the whole investigation, it shall appear that a security for money was intended, it is a mortgage, whatever may be its terms; and it will be remembered that to a mortgage the right of redemption is inseparably annexed.²² And if, on the other hand, it shall, upon the whole, appear that it was a conditional sale, the performance of the condition punctually at the time cannot be dispensed with. But doubtful cases are generally declared to be mortgages.²³

The character of the transaction, however, is fixed in its inception, and is unaffected by subsequent events unless they amount to a new contract.²⁴

§ 541. Same—Marks of Distinction—1. No Price or an Inadequate One Set on the Property. The marks whereby a mortgage is discriminated from a conditional sale are these: (1) That no price, or an inadequate one, is set on the property; (2) that the grantor remains in possession; (3) that there is a covenant or promise obli-

²¹ 2 Min. Insts. 337; *Barrell v. Sabine*, 1 Vern. 268; *Howard v. Harris*, 1 Vern. 190, 2 White & Tud. Lead. Cas. Eq. 416, 431; *Holladay v. Willis*, 101 Va. 279, 43 S. E. 616.

²² Ante, § 536; 2 Min. Insts. 335, 336.

²³ 2 Min. Insts. 337, 338; *Howard v. Harris*, 1 Vern. 190, 2 White & Tud. Lead. Cas. Eq. 417, 434, et seq.; *Williams v. Owen*, 5 My. & Cr. 303; *Thompson v. Davenport*, 1 Wash. (Va.) 127; *Weathersly v. Weathersly*, 40 Miss. 462, 90 Am. Dec. 344; *Wing v. Cooper*, 37 Vt. 169. See *Hutzler Bros. v. Phillips*, 26 S. C. 136, 4 Am. St. Rep. 699, note.

²⁴ *Holladay v. Willis*, 101 Va. 274, 43 S. E. 616; *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583; *Green v. Butler*, 26 Cal. 595; *Kearney v. Macomb*, 16 N. J. Eq. 189.

ging the grantor to buy back the property; and (4) that the conveyance does not extinguish the debt.²⁵

Where no price is contemplated or discussed, or a price grossly inadequate, it is pregnant evidence that a mortgage was in view, and not a purchase on condition, since an omission to state or to have reference to a stipulated price is a natural and usual concomitant of a mortgage, but is hardly reconcilable with the notion of a sale and purchase; and a grossly inadequate price, if it were treated as a sale, would savor of fraud.²⁶

§ 542. **Same—2. Grantor in Continued Possession of the Property.** The grantor's remaining in possession is strong proof that the transaction is a mortgage, inasmuch as it is usual in such cases, and is not an ordinary concomitant of a sale.²⁷

§ 543. **Same—3. Covenant or Promise Obliging the Grantor to Re-Buy.** That the grantor should oblige himself to repay the money is natural and proper in a mortgage, but hardly compatible with the idea of a conditional sale. In the latter case the grantor reserves the privilege of paying, but does not bind himself to do so. The want of such a promise does not, indeed, necessarily establish the transaction to be a conditional sale, for if it can be shown otherwise to be a mortgage, a promise, as we have seen, is implied; but it is an important circumstance, tending to prove that a conditional sale was designed.²⁸

§ 544. **Same—4. Debt Not Extinguished by the Conveyance.** A mortgage is a security for a debt, while a conditional sale is a purchase, accompanied by an agreement to resell on particular terms. The existence of a debt is necessary to a mortgage. Hence, if there be no debt, or if the conveyance extinguishes the debt and is so intended, so that the plea of payment would bar an action thereon, an agreement then or thereafter with the debtor or grantor giving him an opportunity to reacquire the title is a conditional sale.²⁹

§ 545. **Mortgage Distinguished from Deed of Trust to Secure Debts.** The deed of trust differs in form from a mortgage in that while the latter is a conveyance to the creditor himself (the mort-

²⁵ 2 Min. Insts. 338; 2 Washburn, Real Prop. (6th Ed.) § 989 et seq.

²⁶ 2 Min. Insts. 338; Howard v. Harris, 1 Vern. 190, 2 White & Tud. Lead. Cas. Eq. 435 et seq.; Conway v. Alexander, 7 Cr. 218; Coyle v. Davis, 116 U. S. 108, 6 Sup. Ct. 314, 29 L. Ed. 583; Holmes v. Grant, 8 Paige (N. Y.) 243.

²⁷ 2 Min. Insts. 338; Tuggle v. Berkeley, 101 Va. 83, 43 S. E. 199; Gibson v. Eller, 13 Ind. 124. See 1 Jones, Mortgages, § 274.

²⁸ 2 Min. Insts. 338, 339; Howard v. Harris, 1 Vern. 190, 2 White & Tud. Lead. Cas. Eq. 438 et seq.; Phillips v. Hulsizer, 20 N. J. Eq. 308; Chapman v. Turner, 1 Call (Va.) 288, 1 Am. Dec. 514.

²⁹ Holladay v. Willis, 101 Va. 279, 280, 43 S. E. 616; Turner v. Kerr, 44 Mo. 429; Saxton v. Hitchcock, 47 Barb. (N. Y.) 220.

gagee), but upon condition to be void if the debt secured thereby is paid at maturity, a deed of trust to secure the debt is a conveyance to a third person in trust to sell the land conveyed, if the debt be not paid at maturity, and out of the proceeds, after paying the expense of executing the trust, to pay the creditor his debt with interest, and to pay over the balance to the debtor or his representatives.³⁰

The difference in effect between the two forms of incumbrance is mainly to be found in the fact that in case of the mortgage, for the protection of the mortgagor or debtor, it is required of the mortgagee that he must ask the aid of the court of equity to decree a foreclosure of the mortgage, a more or less expensive and tedious procedure, while in the case of a deed of trust the trustee, who is supposed to be representing impartially the interests of both creditor and debtor, may be and is entrusted with the authority to sell the property and distribute the proceeds justly and properly, without the necessity of a judicial decree of foreclosure. It is at all events his duty to act impartially and disinterestedly, and he ought to disregard the suggestions of either party inconsistent with the character he holds, and with his impartial duty as the agent of both.³¹

§ 546. **Power of Sale Reserved to the Mortgagee—1. In Case of Chattel Mortgage.** In England such a power is uniformly admitted, as it is also by the common law in the case of chattels pawned (that is, where the possession is delivered to the creditor), after notice to redeem.³²

§ 547. **Same—2. In Case of a Mortgage of Land.** In England, it seems, unfortunately, to have been settled that a power of sale, even of lands, may be reserved to the mortgagee, whose disposition of the property will be supported in equity. The practice had gained some foothold, when it was powerfully shaken by the objection manifested to it by Lord Eldon, in 1825, in *Roberts v. Bozon*;³³ but it seems now to have been recognized in many cases.³⁴

³⁰ 2 Min. Insts. 340.

³¹ 2 Min. Insts. 340; 1 Tucker, Com. 103 et seq.; *Quarles v. Lacy*, 4 Munf. (Va.) 251; *Lane v. Tidball*, Gilmer (Va.) 132; *Chowning v. Cox*, 1 Rand. (Va.) 311, 10 Am. Dec. 530.

³² 2 Min. Insts. 350, 351; 4 Kent, Com. 139; *Lockwood v. Ewer*, 2 Atk. 303; *Tucker v. Wilson*, 1 P. Wms. 261, 1 Bro. Ch. 494.

³³ 1 Powers, Mortg. 9, note.

³⁴ 2 Min. Insts. 351; *Corder v. Morgan*, 18 Ves. 344; *Clay v. Sharpe*, 6 Ves. 346; *Crofts v. Powel*, Comyn, 603; *Anon.* 6 Madd. 10; *Wright v. Rose*, 7 Sim. & Stu. 323.

In some of the states of this country the exercise of this power of sale is forbidden by statute; in others, while its exercise is permitted, it is so hedged around with statutory restrictions that it is seldom resorted to. In any case, it is a cumulative remedy and does not preclude a foreclosure. "It is one species of foreclosure; but it does not preclude jurisdiction in equity."³⁵

§ 548. Character of Mortgagor's Estate before Default. If there be a stipulation in a common law mortgage that the mortgagor shall remain in possession until default of payment, he is considered until then tenant for years of the mortgagee. But as soon as default occurs, if he continues in possession at all, it is as tenant at will, or more properly by sufferance, to the mortgagee, but not so as to entitle him to emblements.³⁶

If there be no stipulation (as, however, there usually is) for the continued possession of the premises by the mortgagor, until default, if he occupies them at all, it is as tenant at will, or perhaps by sufferance; and in either character he can lay no claim to the emblements.³⁷

Obviously, the foregoing can have no application to the case of a lien theory mortgage, for under it the mortgagee acquires no estate in the land.³⁸

§ 549. Character of Mortgagor's Estate after Default at Law. At law, after default, the legal title is vested in the mortgagee, the mortgagor being merely his tenant at will, or perhaps by sufferance, but entitled to no emblements.³⁹

But under the lien theory a default works no change in the estate of the mortgagor.⁴⁰

§ 550. Mortgagor's Equity of Redemption. In equity, the mortgagor has that right to redeem within a reasonable time, which has been already described as an equity of redemption. The time which shall be deemed reasonable is not definitely fixed. As long as the mortgagor continues in possession, no limit is imposed; and if that possession continue adversely a sufficient length of time, it amounts to an extinction of the lien. The right to redeem is liable to be limited, or barred by the lapse of time, only when the mortgagee has been in the uninterrupted enjoyment of the premises for a considerable period. That period has long been fixed at twenty years, by analogy to the bar of a right of entry by the

³⁵ 2 Jones, Mortgages, § 1773.

³⁷ 2 Min. Insts. 355.

³⁶ 2 Min. Insts. 355; 2 Bl. Com. 158.

³⁸ Ante, § 538.

³⁹ 2 Min. Insts. 356; 2 Bl. Com. 159, note (11); *Faulkner v. Brockenhough*, 4 Rand. (Va.) 245.

⁴⁰ Ante, § 538.

statute of limitations (21 Jac. I, c. 16), according to the English cases; but according to the view adopted in this country, in consequence of the lapse of that time warranting the presumption of an abandonment of the equity, as of all other equities, and as in like manner it warrants, even in a court of law, a presumption of satisfaction of a debt.⁴¹

There is a class of securities known as Welsh mortgages, whose peculiarity it is to allow a perpetual right of redemption, after an indefinite period of time, the mortgagee entering and taking the profits as a substitute for the interest, until the debt is discharged by the mortgagor, but having no power to enforce the payment of the debt, nor the redemption of the land. It bears, therefore, some resemblance to the *vivum vadium*, but with this difference, that in the case of the latter security the mortgagee took possession and received the profits towards his debt, whereby the estate pledged worked out, as it were, its own redemption. But both the Welsh mortgage and the *vivum vadium* have gone into practical disuse, even in England.⁴²

In order to exhibit the terms upon which the mortgagor is allowed to redeem, it will be necessary to advert to: (1) The payment of the mortgage money, with interest; (2) the tacking of subsequent debts to mortgages; (3) the right to recover any surplus not satisfied by the mortgaged subject.

§ 551. Same—To Redeem, Mortgagor must Pay Mortgage Debt with Interest. The mortgagor, proposing to redeem, will be expected to pay the principal money, with interest, after deducting therefrom, if the mortgagee has been in possession, the rents and profits derived, or which, with reasonable care, might have been derived, from the mortgaged estate, less the expenses actually incurred by the mortgagee, as in hiring an agent, etc., but allowing him nothing for his own trouble, even though there be a private agreement to that effect. The mortgagee in possession, besides accounting for the actual profits received whilst he held the property, and such as, but for his willful default, he might have received, is also chargeable with any waste or dilapidation committed by him, or suffered by his neglect. A mortgagee may charge taxes paid, and expenses incurred in keeping the estate in repair, and also in defending the title, but not for expenses incurred in specula-

⁴¹ 2 Min. Insts. 357; 2 Bl. Com. 159, note (8); *Howard v. Harris*, 1 Vern. 190, 2 White & Tud. Lead. Cas. Eq. 425 et seq.; *Hovenden v. Lord Annesley*, 2 Sch. & Lefr. 636; *Cholmondeely v. Clinton*, 2 Jac. & Walk. 151; *Ross v. Norvell*, 1 Wash. (Va.) 14, 1 Am. Dec. 422; 2 Jones, Mortgages, § 915.

⁴² 2 Min. Insts. 358; 2 Bl. Com. 157; 1 Washburn, Real Prop. 476; *Livingston v. Story*, 11 Pet. 388, 9 L. Ed. 746.

tions or adventures, as in opening mines and quarries, etc., nor for insurance (which may be for his own security), unless by the consent of the mortgagor.⁴³

Whether a mortgagee in possession shall be credited by the value of the permanent and beneficial improvements which he may have put on the premises is a controverted question. It seems that he should always be so credited with them to the extent of the rents and profits; and the better opinion would seem to be that he is to be allowed the whole value, at least of such improvements as may have been made before the suit to redeem was instituted.⁴⁴

An agreement to set the profits of the property against the interest, where they must, in the ordinary course of things, greatly exceed the legal rate, is oppressive (it has been even said to be usurious) and void, and the account of profits is to be taken in the usual way.⁴⁵

As to the persons who may claim to redeem, it is a general rule that the right to redeem belongs to any one who has an interest in or lien upon the land. Hence the assignee of the equity of redemption, the heir or devisee of the mortgagor, or, if the mortgagor were the owner merely of a term for years, his personal representative, a consort entitled to dower or curtesy in the land, a jointress, a subsequent incumbrancer, such as a joint creditor, or a subsequent mortgagee, or an assignee in bankruptcy—all these may offer to redeem.⁴⁶

§ 552. Same—Conditions of Redemption—Tacking of Debts to Mortgages. When the mortgagor presents himself to redeem, if the creditor has made subsequent advances, or the mortgagor is otherwise indebted to him, it would, of course, be very acceptable to the creditor if he could constrain the debtor to pay the debts subsequently or otherwise contracted, as the price or condition of his being allowed to redeem the land from the mortgage. But in order that the creditor may exact such a condition, either (1) the debt must be of such a character as will constitute a specific charge on the land, or (2) it must be a constituent part of the original agreement that it shall be included in the security.⁴⁷

⁴³ 2 Min. Insts. 358, 359; *Howard v. Harris*, 1 Vern. 190, 2 White & Tud. Lead. Cas. Eq. 429, 430.

⁴⁴ 2 Min. Insts. 359; 4 Kent, Com. 167; *Breckenridge v. Auld*, 1 Rob. (Va.) 158, 159.

⁴⁵ 2 Min. Insts. 359; *Robertson v. Campbell*, 2 Call (Va.) 430.

⁴⁶ 2 Min. Insts. 359; *Howard v. Harris*, 1 Vern. 190, 2 White & Tud. Lead. Cas. Eq. 415, 424; *Gatewood v. Gatewood*, 75 Va. 408. Even a grantee from the mortgagor under a voluntary deed may offer to redeem. 2 Min. Insts. 330.

⁴⁷ 2 Min. Insts. 359.

§ 553. **Same—1. Tacking of Debts Specifically Charged on Mortgaged Land.** The ground on which the debt specifically charged on the land by lien, etc., may be tacked to the mortgage (such is the homely phrase of the court of equity) is to avoid a multiplicity of suits, and, as some say, also because he who asks equity should do it. Why (equity asks) allow a redemption without paying the additional debt, when the consequence will be the institution of another suit to charge it upon the subject? Why not avoid the necessity for the second suit by obliging the debtor to pay both debts upon his suit to redeem the mortgage? and especially as thereby the policy will be effectuated of compelling him who asks equity to do equity.⁴⁸

Hence, as above stated, in order that the principle may apply, the debt proposed to be tacked to the mortgage must be such as will constitute a specific charge on the land after it is redeemed from the mortgage.⁴⁹

The process of tacking is applicable in all cases where the mortgaged subject is specifically charged with the subsequent debt. Hence it is applicable as against a personal representative, in case of a mortgage of a term for years, etc., or as against a married woman's separate property, etc.⁵⁰

In general, no simple contract debt constitutes a specific charge against one's lands whilst one is living, and hence the tacking of a subsequent debt is not, in general, allowed against the mortgagor. However, in all cases where the subsequent debt is a specific charge on the lands in the possession of the mortgagor, the principle will apply, as where it is a judgment debt, or a recognizance or a delinquent tax. So, where the subsequent debt is a specific charge upon the separate estate of a married woman, it will be tacked to a mortgage of the same estate, so as to compel her to pay such debt as the condition of redeeming the mortgage.⁵¹

If the mortgagor be dead, then, at common law, bond debts binding the heir, and debts of record, constituted a specific charge on the lands in the hands of the obligor's heir, and afterwards, by the statute of fraudulent devises (3 & 4 W. & M. c. 14), in the hands of his devisee. Where the debt was of this character, therefore, it might be tacked to the mortgage. In this country, generally, all debts are a specific charge on a decedent's lands, and so all debts may be thus tacked.

⁴⁸ 2 Min. Insts. 360; Woodson v. Perkins, 5 Grat. (Va.) 351.

⁴⁹ 2 Min. Insts. 362; Woodson v. Perkins, 5 Grat. (Va.) 352.

⁵⁰ 2 Min. Insts. 362; Woodson v. Perkins, 5 Grat. (Va.) 352.

⁵¹ 2 Min. Insts. 361; Woodson v. Perkins, 5 Grat. (Va.) 352; Brown v. Simons, 44 N. H. 475.

But as against a subsequent incumbrancer, the assignee of an equity of redemption, or a subsequent purchaser from the mortgagor's heir or devisee, the tacking in question is not allowed, as they manifestly do not come within the principle.⁵²

§ 554. **Same—2. Mortgage to Secure Future Advances.** A mortgage or deed of trust may contemplate and provide for securing future advances, as well as the advances presently made. Such a mortgage or deed of trust is always valid and binding as against the mortgagor and his representatives, and those claiming under him with notice that such future advances are to be made, or without valuable consideration. And the registry of the mortgage or deed of trust is notice to subsequent purchasers and incumbrancers of the existence and extent of the obligation thus incurred by the mortgagee, provided the mortgage or deed of trust is sufficiently clear, certain and accurate to give the necessary information, so that subsequent parties may, by inspection of the deed and by common prudence and ordinary vigilance, ascertain the extent of the incumbrance.⁵³ This case of tacking rests for its scope and extent entirely upon the contract of the parties, as disclosed in the mortgage or deed of trust.⁵⁴

A different question is presented when we come to consider the right of the mortgagee or creditor secured by such a mortgage or deed of trust to make subsequent advances in accordance with the terms of the deed after he has notice of the fact that a new mortgage subsequent to his has been placed upon the same land or that the land has been conveyed to another. The better view seems to be that if the original mortgagee has bound himself to make future advances when demanded, he may make such advances and they will take priority, under his original mortgage or deed of trust, over the

⁵² 2 Min. Insts. 361.

⁵³ 2 Min. Insts. 360; *United States v. Hooe*, 3 Cr. 73; *Shirras v. Calg*, 7 Cr. 34; *Jones v. New York Guaranty & I. Co.*, 101 U. S. 622, 25 L. Ed. 1030; *Alexandria Saving Inst. v. Thomas*, 29 Grat. (Va.) 487; *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Robinson v. Williams*, 22 N. Y. 380; *Divver v. McLaughlin*, 2 Wend. (N. Y.) 596, 20 Am. Dec. 655, 658, note; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *Boswell v. Goodwin*, 31 Conn. 74, 81 Am. Dec. 169; *Summers v. Roos*, 42 Miss. 749, 2 Am. Rep. 653; *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *Louisville Banking Co. v. Leonard*, 90 Ky. 106, 13 S. W. 521; *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102. The future advances constitute a sufficient consideration to support the assignment as to existing creditors of the grantor, and it is not to be set aside as to them as being voluntary, merely because there are no existing debts secured thereby. *Alexandria Saving Inst. v. Thomas*, *supra*.

⁵⁴ 2 Min. Insts. 260.

claims of a subsequent bona fide incumbrancer or purchaser, though at the time of making such advances he has notice of the existence of the subsequent deed;⁵⁵ though some of the decisions take the view that the right of the prior mortgagee to make advances ceases, as against a subsequent purchaser or incumbrancer, in all cases as soon as he receives notice of such subsequent deed.⁵⁶

Yet another question arising in this connection relates to the effect of the registry of a subsequent incumbrance as notice, so far as concerns later advances made by the original mortgagee. Thus where M. executes a mortgage to A. to secure future advances, and subsequently executes another mortgage on the same land to B., which is recorded, is such registry notice to A. of the existence of B.'s incumbrance when A. comes to make later advances under the original mortgage to A.? In other words, is A. a subsequent purchaser (as to the later advances) taking by a later title than B., or does he (even as to such later advances) take under a title prior to B.'s?⁵⁷

Here, again the authorities are in conflict, some holding that the original mortgage constitutes a separate lien for each advance as it is made, at least when the making of the advances is voluntary, so that as to any advances made after the recordation of a subsequent incumbrance the mortgage securing such advances is subsequent and subordinate thereto; the mortgagee being thus bound to consult the records before making an advance.⁵⁸ Other authorities take the view that all the advances, even those later than the subsequent incumbrance, are secured by the one single mortgage, which is itself prior to the subsequent incumbrance, and hence that the registry of the subsequent incumbrance, being notice only to subsequent purchasers, is not notice to the prior mortgagee, who

⁵⁵Alexandria Saving Inst. v. Thomas, 29 Grat. (Va.) 489; Heintze v. Bentley, 34 N. J. Eq. 562; Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169; Brinkmeyer v. Browneller, 55 Ind. 487; McClure v. Roman, 52 Pa. 458; Union Nat. Bank v. Moline, Milburn & Stoddard Co., 7 S. D. 201, 73 N. W. 527; Tapia v. De Martini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288, note.

⁵⁶See Hopkinson v. Rolt, 9 II. L. Cas. 514; Griffin v. New Jersey Oil Co., 11 N. J. Eq. 49; Spader v. Lawler, 17 Ohio, 371, 49 Am. Dec. 461; Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621; McDaniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512; Ladue v. Detroit & M. R. Co., 13 Mich. 380, 87 Am. Dec. 759.

⁵⁷The question is raised, but not decided, in Alexandria Saving Inst. v. Thomas, 29 Grat. (Va.) 489.

⁵⁸Ladue v. Detroit & M. R. Co., 13 Mich. 380, 87 Am. Dec. 759; Spader v. Lawler, 17 Ohio, 371, 49 Am. Dec. 461; Bank of Montgomery County's Appeal, 36 Pa. 170; 2 Tiffany, Real Prop. § 513.

may make the advances until he has actual knowledge of the subsequent incumbrance.⁵⁹

§ 555. Mortgagee's Right to Recover Deficit by Personal Action. If the property mortgaged is not sufficient to satisfy the debt, or if, being personalty, it be lost or destroyed, it seems to be an established principle, as in justice and good sense it ought to be, that in the absence of any stipulation to the contrary the mortgagee is a creditor of the mortgagor for the surplus left unpaid. Every pledge implies a loan, and every loan implies a debt, so that, even although there be no express promise to pay, one is always implied from the mere existence of a mortgage or pledge.⁶⁰

The character of the action to be brought will depend at common law on whether the promise is contained expressly in the deed of mortgage or of trust, or in some other instrument under seal, or whether it is merely implied, or, if express, is in an instrument not under seal. In the former case the action may be either debt or covenant, and in the latter debt or trespass on the case in *assumpsit*.⁶¹

The mortgagee may pursue concurrently his remedy in equity upon the mortgage, and his remedy at law upon the accompanying promise, whether express or implied, and there seems to be no sufficient reason why the court of equity itself may not, upon a bill to foreclose the mortgage, at once decree the sale of the mortgaged subject, and pronounce a personal decree against the mortgagor for any surplus which the proceeds of the sale may leave unsatisfied. To do so consults economy and dispatch, tends to prevent multiplicity of suits, and is in conformity with the principle that when equity obtains legitimate cognizance of a subject, for the purpose

⁵⁹ 3 Pomeroy, Eq. Jur. § 1199; *Union Nat. Bank v. Moline*, Milburn & Stoddard Co., 7 N. D. 201, 73 N. W. 527; *Ackerman v. Hunsicker*, 85 N. Y. 43, 39 Am. Rep. 621; *Ward v. Cooke*, 17 N. J. Eq. 93; *Frye v. Bank of Illinois*, 11 Ill. 367; *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *Tapia v. De Martini*, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288, note.

⁶⁰ 2 Min. Insts. 362; *Williams v. Price*, 5 Munf. (Va.) 527; *Bumgardner v. Allen*, 6 Munf. (Va.) 445; *Raynolds v. Carter*, 12 Leigh (Va.) 170, 37 Am. Dec. 642. See *Turk v. Ritchie*, 104 Va. 587, 52 S. E. 339.

⁶¹ 2 Min. Insts. 362; 1 Tucker, Com. 114; *Fonblanque*, Eq. B. III, c. 1, § 12; *Drummond v. Richards*, 2 Munf. (Va.) 337. As to whether there is a promise to be derived by construction from the words of the instrument or not, see *Bac. Abr. Debt* (A); *Id.*, *Obligation* (B); 1 Dy. 226; *Baker v. Fawcett*, referred to by Tucker, P., in *Powell v. White*, 11 Leigh (Va.) 318; 2 Rob. Pr. (2d Ed.) 40; *Courtney v. Taylor*, 6 Man. & Gr. 851; *Lytle v. Pope*, 11 B. Mon. (Ky.) 311; *James v. Cochrane*, 7 W. H. & G. 177. It depends upon the intention of the parties, and in general the ordinary terms of a deed of trust do not justify the implication of an actual promise to pay. *Wolf v. Violet*, 78 Va. 57, 60.

of relief, it administers complete justice, without turning the parties around to another tribunal.⁶² This is the practice of the United States Circuit Courts.⁶³

§ 556. **Effect of Lapse of Time on Mortgagor's Right to Redeem.** Redemption is not allowed without some regard to the lapse of time; not that the case is within the statute of limitations, but, although the mortgagor is indulged with considerable latitude in point of time for redemption, because property is usually mortgaged for much less than its real value, and when a mortgagee receives his principal, interest, and costs, he cannot complain of an injury, yet to this indulgence there is a necessary limit. And as it is extremely difficult for a mortgagee who has been long in possession to render an account of profits, the courts of equity have laid it down as a rule that, where the mortgagor has suffered the mortgagee to continue for twenty years after forfeiture in the quiet and uninterrupted possession of the lands mortgaged, the right of redemption shall be presumed to be abandoned.⁶⁴

Whether the bar to redemption arises from the analogy of the statute of limitations, or from mere presumption of abandonment, such as occurs in case of all equitable rights, is a question of some moment; for, if it proceeds from the analogy of the statute of limitations, the period would be different in different states.

But whatever may be the source and ground of the limitation, it is admitted to be a mere presumption, capable of being repelled by circumstances sufficient to satisfy the mind that, in the particular case, it is ill-founded. Thus, not only will it be repelled by the existence of any of the impediments which would repel the bar of the statute (infancy, insanity, etc.), but also by any circumstances of fraud or oppression on the part of the mortgagee tending to clog or embarrass the redemption, and by even a slight act of the mortgagee, or his representative, acknowledging the continued right of the mortgagor, such as by keeping private accounts of the profits of the estate, as if it were still redeemable, especially if kept with the mortgagor, etc., or by conveying subject thereto, or offering to purchase it, or even by a parol recognition in conversation of the mortgagor's right, provided it were clear and unequivocal.⁶⁵

⁶² 2 Min. Insts. 362, 363; 4 Kent, Com. 183.

⁶³ Equity Rule 92.

⁶⁴ 2 Min. Insts. 370, 371; 2 Rob. Pr. (1st Ed.) 253; *Aggas v. Pickerell*, 3 Atk. 225; *Jones v. Comer*, 5 Leigh (Va.) 353; *Hughes v. Edwards*, 9 Wheat. 497, 6 L. Ed. 142; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 135, 8 Am. Dec. 467; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48.

⁶⁵ 2 Min. Insts. 357; *Turnbull v. Mann*, 99 Va. 46, 37 S. E. 288; *Snively*

There is, indeed, a very marked distinction between the personal obligation of the debtor and the security furnished by a lien expressly reserved or a mortgage, with respect to the bar of the statute of limitations. Thus, in *Hanna v. Wilson*,⁶⁶ it was held, that, although an action at law might be barred by the statute of limitations, yet the right of the creditor to resort to the lien, in that case the vendor's lien, being a right in equity, is not affected by any lapse of time, short of the period sufficient to raise a presumption of payment.⁶⁷

§ 557. Character of Mortgagee's Estate before Default. At law, before default, the mortgagee (under the common-law theory) has always the legal estate, with the right to the possession or not, according to the stipulations of the mortgage deed.⁶⁸

And hence such a mortgagee, after giving notice of the mortgage to the tenant in possession, under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrein for it after such notice.⁶⁹

In equity the common-law mortgagee is a trustee for the mortgagor, and, under either theory, if in possession, is subject to account for rents and profits, and for any waste committed by him, with a lien on the premises for his debt, but obliged to yield possession if the money be paid according to the condition.⁷⁰

§ 558. Character of Mortgagee's Estate after Default. At law, after default in performing the condition, the common-law mortgagee is, to all intents and purposes, the legal owner of the land, in

v. Pickle, 29 Grat. (Va.) 38; *Howard v. Harris*, 1 Vern. 190, 2 White & Tud. Lead. Cas. Eq. 425 et seq.

⁶⁶ 3 Grat. (Va.) 245, 46 Am. Dec. 190.

⁶⁷ 2 Min. Insts. 371; *Angell, Lim.* § 73. The same doctrine was applied in the case of a mortgage, in *Thayer v. Mann*, 19 Pick. (Mass.) 535, and is confirmed by *Magruder v. Peter*, 11 Gill & J. (Md.) 217; *Borst v. Corey*, 15 N. Y. 505; *Bank of Metropolis v. Guttschlick*, 14 Pet. 29, 10 L. Ed. 335; *Coles v. Withers*, 33 Grat. (Va.) 196; *Smith v. Washington City, V. M. & G. S. R. Co.*, 33 Grat. (Va.) 620.

⁶⁸ 2 Min. Insts. 356; 2 Bl. Com. 158; *Erskine v. Townsend*, 2 Mass. 493, 3 Am. Dec. 71; *Reading of Judge Trowbridge*, 8 Mass. 551; *Goodwin v. Richardson*, 11 Mass. 469; *Fay v. Brewer*, 3 Pick. (Mass.) 203; *Flagg v. Flagg*, 11 Pick. (Mass.) 475; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Fay v. Cheney*, 14 Pick. (Mass.) 399; *Bradley v. Fuller*, 23 Pick. (Mass.) 49.

⁶⁹ 2 Min. Insts. 356; *Bac. Abr. Mortgage (C)*; 2 Th. Co. Lit. 36, note (Z); *Ex parte Wilson*, 2 Ves. & B. 252; *Babcock v. Kennedy*, 1 Vt. 457, 18 Am. Dec. 697; *Stoney v. Shultz*, 1 Hill, Eq. (S. C.) 465, 27 Am. Dec. 437; *Moss v. Crallimore*, 1 Dougl. 282, 283; *Birch v. Wright*, 1 T. R. 383, 384.

⁷⁰ 2 Min. Insts. 356.

whom the legal estate is vested, and who is entitled to the possession.⁷¹

But in equity the mortgagee is reckoned a mere trustee for the mortgagor, accountable for rents and profits, and for waste, and to be allowed for expenses actually incurred, but not a compensation for his trouble.⁷²

§ 559. Mortgagee's Remedies by Action at Law—1. Action for the Money. The creditor, instead of enforcing his claim in rem against the mortgaged subject, may bring an action at law to recover the money, unless it has been expressly stipulated that he shall look to the property only. Even though there be no promise to pay contained in the mortgage itself, yet, as we have seen, every pledge implies a debt, and a promise to pay it. If the promise to pay is express and under seal, whether contained in the deed of trust or mortgage, or in some other specialty, the proper action for the money at common law is debt or covenant; if not under seal, whether express or implied, the action is debt or trespass on the case in assumpsit.⁷³

The mortgagee may pursue his remedy thus at law, upon the promise to pay, whether express or implied, and his remedy in equity upon the mortgage, concurrently; and it seems he may proceed in equity at the same time to foreclose the debtor's equity of redemption, and to obtain a personal decree against him for any surplus which may remain unsatisfied by the proceeds of the mortgaged subject.⁷⁴

§ 560. Same—2. Action of Ejectment for the Land. If the common-law mortgagor remains in possession, the mortgagee may sue in ejectment to recover the land whilst he has a bill of foreclosure depending. He may pursue both his equitable and his legal remedies at the same time.⁷⁵

And for the purpose of securing the rents and profits of the land, the mortgagee may bring ejectment, whether before or after default, unless restrained by the terms of the mortgage, or by some statute.⁷⁶

⁷¹ 2 Min. Insts. 372; Bac. Abr. Mortgage (C). See *Townshend v. Thomson*, 139 N. Y. 152, 34 N. E. 891.

⁷² 2 Min. Insts. 372; Bac. Abr. Mortgage (C).

⁷³ Ante, § 555; 2 Min. Insts. 374, 375; 4 Kent, Com. 182 et seq.

⁷⁴ 2 Min. Insts. 375; 4 Kent, Com. 183.

⁷⁵ *Torrey v. Cook*, 116 Mass. 163; *Erickson v. Rafferty*, 79 Ill. 209.

⁷⁶ 2 Washburn, Real Prop. (6th Ed.) § 1044. In some states a mortgagee even under the common-law theory is by statute denied the right of possession of the land until condition broken.

§ 561. **Mortgagee's Proceedings in Equity to Foreclose.** The mortgagee, as soon as default of payment occurs, may file a bill to foreclose (as the technical phrase is) the mortgagor's equity of redemption; that is, to appoint a time, usually six months, although it may be less, within which, if the money be not paid, the mortgagor shall be forever foreclosed, or barred of his right to redeem. In England, the practice is to decree foreclosure of the equity of redemption, and that the mortgagee have the absolute right of property; and in some of the states of this country, in which the common-law mortgage is retained, the same rule prevails. This is termed strict foreclosure. In other states, a sale of the property is decreed, and, after payment of the debt and costs, the residue, if any, is returned to the debtor or his assignee. This is termed equitable foreclosure, and it is the only method of foreclosure by judicial process in those states which adhere to the lien theory.⁷⁷

§ 562. **Same—Proper Parties to Bill to Foreclose.** All junior incumbrancers existing at the filing of the bill and all persons standing in privity with the mortgagor subsequent to the mortgage are to be made parties, partly in order to prevent multiplicity of suits, and that the proceeds of the mortgaged estate may be duly and finally distributed, and partly in order to give security and stability to the purchaser's title, since he can take a title only against the parties to the suit.

The rule is that all persons who have a right to redeem should be made parties. Prior incumbrancers have no right to redeem, and therefore they are not, in general, proper parties; the decree of foreclosure taking effect subject to their prior rights.⁷⁸

The bill is usually filed by the creditor, or his assignee, or his personal representative.⁷⁹

§ 563. **Who Entitled to Mortgage Money upon Mortgagee's Death.** The doctrine as to the person to whom mortgage money is payable was settled so early as the reign of Charles II, by Lord Nottingham, in the leading case of *Thornborough v. Baker*,⁸⁰ upon the principle that the mortgage was only a security for the money due, which came from the personal estate, and therefore, in the absence of any stipulation to the contrary, the proceeds shall return thither again. If there is any direction in the mortgage itself as to who is to receive the money, it is to be respected. If there be no such direction, it is to be paid to the mortgagee, if he be living, or to

⁷⁷ 2 Jones, Mortgages, § 1318 et seq.

⁷⁸ 1 Foster, Fed. Prac. § 44; 2 Jones, Mortgages, § 1439.

⁷⁹ 2 Min. Insts. 376, 377; 4 Kent, Com. 185 et seq.

⁸⁰ 3 Swanst. 628, 2 White & Tud. Lead. Cas. Eq. 403 et seq.

his assignee. If the mortgagee be dead, not having assigned the mortgage, or debt, the money is to be paid to his personal representative, and not to his heir, although, in case of default in a mortgage in fee, the legal title descends to the heir. Where the heir is, by the terms of the mortgage itself, designated to receive it, it must be paid to him accordingly; and where it is expressly appointed to be paid either to the heir or to the personal representative in the disjunctive, the mortgagor, at the day of payment, may pay it to which he will; but if he make default, and pay it not at the day, his election is gone, and he must pay the personal representative.⁸¹

This proposition is not to be understood as if the mortgagee may not, by his will, vest the beneficial interest in the heirs, or in whom he will; but it is apprehended that it will pass as personalty, and therefore must go into the hands of the personal representative, like any other personalty disposed of by will, and be subject to the payment of the decedent's debts, after which the personal representative will hold it as trustee for the person to whom the will gives it.⁸²

Upon similar reasoning it is held that after the death of a creditor secured by a deed of trust on real property, there can be no valid sale under the deed of trust until the creditor's personal representative has qualified upon his estate, except with the consent of the debtor and of all persons interested in the debt secured.⁸³

§ 564. Who Liable for Mortgage Money upon Mortgagor's Death. The premises mortgaged are a pledge for a debt, which is constituted by the mortgage itself. If there be a covenant in the mortgage deed, or a collateral bond for the payment of the money, it is a specialty debt; otherwise, a simple contract debt. Hence, in either case, the mortgagee is a creditor of the mortgagor, and is entitled to be paid out of the personal assets of the mortgagor, as well as out of the mortgaged estates.⁸⁴

As long as the mortgagor survives, no question arises; but upon his death it becomes an interesting inquiry whether the debt (which the creditor may charge on either fund) shall ultimately be a burden on the mortgaged subject, or on the general personal estate of the debtor. The general principle in equity is that the fund which received the benefit shall make satisfaction; and as, for the most part, the personal estate was increased by the money secured, so the personal estate shall be first applied towards the payment of the mort-

⁸¹ 2 Min. Insts. 382; 2 Th. Co. Lit. 55, 52, note (L, 1); 4 Kent, Com. 161.

⁸² 2 Min. Insts. 382.

⁸³ *Armistead v. Kirby*, 106 Va. 585, 56 S. E. 570.

⁸⁴ 2 Min. Insts. 385, 386.

gage. Hence the personal representative of a mortgagor is, in general, compellable to redeem a mortgage for the benefit of the heir, and a fortiori for the benefit of the devisee.

This principle is well illustrated by the case of *Dandridge v. Minge*.⁸⁵ In that case the heir and distributee of the mortgagor was a feme covert, and it was held that it was the duty of the personal representative of the mortgagor to apply the personal assets to redeem the land for the benefit of the married woman and her heirs, and that no arrangement between such representative and the husband would justify the diversion of the assets from that object, because in such case she loses her real estate, unless the husband shall think fit to pay the debt, and he would have held the personal assets divested of any claim on the part of her and her heirs.⁸⁶

This, the natural order, may, of course, be reversed at the pleasure of the decedent, who may exonerate his personal estate, and charge his debts, one and all, first on the real estate, although such an intent must be clearly manifested, which is not sufficiently done by directing his debts to be paid out of his lands, because he may have designed by that to create only an auxiliary fund. He must not only charge his real, but must exempt his personal, property. Such an exemption is effected, not, indeed, as against the creditor, but as against the real representative, that is, the heir of the testator, by the specific gift of a chattel in his will.⁸⁷

Where the mortgage debt was not originally contracted by the decedent, but the lands come to him by purchase or descent, subject to the mortgage, as the reason for the doctrine above stated no longer exists, the doctrine itself is not applicable. The mortgaged estate is the primary fund for the payment of the debt, and the personal estate, if liable at all, is merely auxiliary. And so it is, a fortiori, where one purchases an equity of redemption, unless, indeed, by unequivocal acts he adopts the mortgage debt as his own.⁸⁸

§ 565. Mortgagee's Assignment of the Debt Secured by Mortgage. A mortgage being a mere security for the debt, and col-

⁸⁵ 4 Rand. (Va.) 397.

⁸⁶ 2 Min. Insts. 386; 1 Story, Eq. Jur. § 571. See *French v. Vradenburg*, 105 Va. 16, 52 S. E. 695, 3 L. R. A. (N. S.) 898, 115 Am. St. Rep. 838; *Elliott v. Carter*, 9 Grat. (Va.) 541.

⁸⁷ 2 Min. Insts. 386; *Foster v. Crenshaw*, 3 Munf. (Va.) 514; *McLoud v. Roberts*, 4 Hen. & M. (Va.) 444; *Ryder v. Wager*, 2 P. Wms. 329, 335; *Aldrich v. Cooper*, 8 Ves. 382, 2 White & Tud. Lead. Cas. Eq. 175; *Ancaster v. Mayer*, 1 Bro. Ch. 454, 1 White & Tud. Lead. Cas. Eq. 432 et seq., 446 et seq., 451 et seq.

⁸⁸ 2 Min. Insts. 386, 387; *Ancaster v. Mayer*, 1 Bro. Ch. 454, 1 White & Tud. Lead. Cas. Eq. 447, 454; *Daniel v. Leitch*, 13 Grat. (Va.) 207.

lateral to it, an assignment of the debt, which is the principal, will, in equity at least, carry with it the mortgaged property, which is only the accessory, and which cannot exist independently of the debt to which it is the incident. And, on the other hand, an assignment of the mortgage will *prima facie* transfer the debt.⁸⁹

The mode of assignment may be very various. Whatever would give the money will carry the estate in the land along with it to every purpose; and so whatever will extinguish the debt will extinguish the mortgage. On the other hand, as long as the debt remains capable of identification, however changed may be the security (as in case of negotiable notes secured by mortgage, and renewed from time to time), the mortgage continues to subsist.⁹⁰

No particular form of assignment is required, nor, though the obligation be under seal, is it necessary that the assignment thereof be in writing. If the consideration be proved (as it probably would be *prima facie* by a written assignment), and the intention to assign be apparent, the equitable title passes. Hence the mere delivery of the written evidence of the debt, with intent to transfer it, proves and constitutes an assignment.⁹¹

It is to be observed in respect to the assignment of mortgages, notwithstanding that much insisted on, and in its time very wholesome, rule of the common law which, says Lord Coke, "the great wisdom and policy of the sages and founders of our law have provided, that no possibility, right, title, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice,"⁹² yet in the courts of equity such assignments, have been

⁸⁹ 2 Min. Insts. 372; 3 Pomeroy, Eq. Jur. § 1210; *Carpenter v. Longan*, 16 Wall. 271, 21 L. Ed. 313; *Morris v. Bacon*, 123 Mass. 58, 25 Am. Rep. 17; *Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373, 14 N. E. 586, 3 Am. St. Rep. 655; *Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393; *Green v. Hart*, 1 Johns. (N. Y.) 580; *Stewart v. Preston*, 1 Fla. 11, 44 Am. Dec. 621; *Welsh v. Phillips*, 54 Ala. 309, 25 Am. Rep. 679; *Williams v. Teachey*, 85 N. C. 402; *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331.

⁹⁰ 2 Min. Insts. 372; *Artrip v. Rasnake*, 96 Va. 284, 31 S. E. 4; *Stimpson v. Bishop*, 82 Va. 198. See 1 Lom. Dig. 440; *Howard v. Harris*, 1 Vern. 190, 2 White & Tud. Lead. Cas. Eq. 446, 447; *Gwathmeys v. Ragland*, 1 Rand. (Va.) 466; *Schofield v. Cox*, 8 Grat. (Va.) 535, 536; *Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150.

⁹¹ 2 Min. Insts. 384; 2 Rob. Pr. (2d Ed.) 222 et seq., 257 et seq.; 2 Story, Eq. Jur. § 1040b; *Bank of Marietta v. Pindall*, 2 Rand. (Va.) 475; 2 White & Tud. Lead. Cas. Eq. 231 et seq.

⁹² 2 Min. Insts. 383; *Lampet's Case*, 10 Co. 48a.

from a very early period admitted, and the rights of the assigns protected and enforced. Indeed, even the courts of law have long since come to recognize the assignee's rights so far as to permit him to prosecute his demand in the name of the assignor, without the latter's assent; the court intervening, if need be, to inhibit the assignor from denying the use of his name, or in any wise obstructing or interfering with the suit.⁹³

§ 566. **Same—Assignment of Nonnegotiable Instrument Secured by Mortgage or Deed of Trust.** The assignee of a debt or chose in action (not negotiable) secured by mortgage or deed of trust, taking only an equitable interest, takes it, as well as the mortgage or deed of trust securing it, subject to all the equities which the debtor has or may acquire against the assignor before the debtor has notice of the assignment, or, as it is sometimes expressed, the assignee cannot be in a better condition than the assignor. Nor does it affect the application of this principle that the assignment is for value, and without notice, nor that after assignment the debtor acknowledged the demand to be just.⁹⁴

But whilst no acknowledgment made after assignment will preclude the debtor from proving, if he can, any equity against the assignor, acquired before he had notice of the assignment, he will be estopped from setting up any equity or defense, however well founded originally, if by his assurance made beforehand he has induced the assignee to acquire the debt.⁹⁵

And upon like principles, if, even after notice of the assignment, the debtor expressly or impliedly promise payment to the assignee, he will be concluded thereby, if to allow the retraction of the promise would operate a fraud upon the assignee, as when, relying upon the debtor's promise, the assignee takes no steps, which he might otherwise have successfully taken, to get payment or additional security from the assignor, who afterwards becomes insolvent.⁹⁶

⁹³ 2 Min. Insts. 383, 384; 2 Story, Eq. Jur. §§ 1039, 1040; Row v. Dawson, 1 Ves. Sr. 331, 2 White & Tud. Lead. Cas. Eq. 201, 205.

⁹⁴ 2 Min. Insts. 384; 2 Story, Eq. Jur. § 1047; Row v. Dawson, 1 Ves. Sr. 331, 2 White & Tud. Lead. Cas. Eq. 215, 233, et seq.; Shippen v. Whittier, 117 Ill. 282, 7 N. E. 642. The principle that an assignment of the debt works in equity an assignment of the mortgage security is attended by no difficulty in those states in which the foreclosure proceedings are equitable. But in the states which adhere to the common-law theory of mortgage and the strict foreclosure thereof, inasmuch as the equitable assignment still leaves the legal estate outstanding in the mortgagee, a strict foreclosure, which only bars the equity of redemption, would still leave the mortgagee the legal owner of the land, although as trustee for his assignee.

⁹⁵ 2 Min. Insts. 385.

⁹⁶ 2 Min. Insts. 385; 2 Pomeroy, Eq. Jur. 812.

§ 567. **Same—Assignment of Negotiable Instrument Secured by Mortgage or Deed of Trust.** While, as has been shown, the ordinary rule is that, where a debt secured by mortgage is assigned, the mortgage is an incident of the debt and passes along with it, yet if the debt secured be negotiable an important question arises whether the mortgage is so intimately connected with the debt as to partake of its characteristic or negotiability. In other words, if the debt be evidenced by a negotiable note secured by mortgage, and the note is assigned to a bona fide holder for value and without notice of equities, does the mortgage which secures the note pass to the assignee likewise free from equities?

Although perhaps the majority of decisions are in favor of the doctrine that the mortgage partakes of the nature of the note it secures, so as to render it negotiable also, thus preventing the mortgagor from setting up antecedent equities in defense of foreclosure,⁹⁷ the better view on principle (and sustained by very respectable authority) is believed to be that the holder of the negotiable security takes the mortgage subject to equities, on the ground that he has two distinct securities, to either of which he may resort, the one a negotiable note, the other the mortgage, the latter being merely an additional and collateral security;⁹⁸ that the two together do not constitute the negotiable security, but only the note; and that the mortgage is and remains a mere common-law security, not negotiable.⁹⁹

§ 568. **Same—Assignment of Mortgage Debt in Successive Parcels.** When several bonds, notes or other demands are secured by one mortgage, deed of trust or other lien, and are assigned in succession to different persons, it is competent for the parties, by agreement, to fix the order in which they shall be paid out of the security; and this agreement may be inferred from the facts surrounding the transaction. But if there are no facts from which such inference can be drawn, the courts are at variance as to how the application shall be made in case the property is not sufficient to pay all

⁹⁷ *Carpenter v. Longan*, 16 Wall. 271, 21 L. Ed. 313; *Taylor v. Page*, 6 Allen (Mass.) 86; *Duncan v. Louisville*, 13 Bush (Ky.) 378, 26 Am. Rep. 201; *Thompson v. Maddux*, 117 Ala. 468, 23 South. 157; *Paige v. Chapman*, 58 N. H. 333; *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697; *Burhans v. Hutcheson*, 25 Kan. 625, 37 Am. Rep. 274; *Barnum v. Phenix*, 60 Mich. 388, 27 N. W. 577; *Keyes v. Wood*, 21 Vt. 331.

⁹⁸ See *Coles v. Withers*, 33 Grat. (Va.) 186.

⁹⁹ 2 Pomeroy, Eq. Jur. § 704, note; 3 Pomeroy, Eq. Jur. § 1210, note (2); *Baily v. Smith*, 14 Ohio St. 396, 84 Am. Dec. 385; *Johnson v. Carpenter*, 7 Minn. 176 (Gil. 120); *Kleeman v. Frisbie*, 63 Ill. 482; *Tabor v. Foy*, 56 Iowa, 539, 9 N. W. 897.

the demands. (1) In some states the demands are to be paid in the order of the date of maturity;¹ (2) in others, ratably without reference to time at all;² and (3) in others, in the direct order of the dates of their assignment, upon the principle that the assignment of the first bond or note to the first assignee carries with it (without regard to the date of maturity) the transfer of so much of the lien as is necessary to pay the demand assigned, and thereby gives to such assignee a preference over the assignor, who then remained the holder of the other claims embraced in the lien; and this preference would not be taken away by subsequent assignments; and so with each assignee thereafter in succession.³ In other words, upon the first assignment the assignee, upon a deficiency of the fund, would certainly be preferred to the assignor, and any subsequent assignee of other of the notes could only take subject to existing equities; and standing in the position of the assignor, he must, like him, be excluded from coming in on the security until the claim of the first assignee is satisfied.⁴

§ 569. Same—Assignment or Release of Mortgage Debt to Mortgagor. Since the mortgage is a mere incident of the debt, and passes and is extinguished (in equity) by whatsoever transaction passes or extinguishes the debt which it secures, it follows that a release or assignment of the debt to the debtor, extinguishing the debt, operates also as a release or discharge of the mortgage. But whilst a release of the debt, which is the principal, discharges the mortgage, which is the incident, it will easily be perceived that the converse is not true. A release of the mortgage does not discharge the debt, unless the tenor of the release prove such to

¹ *Isett v. Lucas*, 17 Iowa, 503, 85 Am. Dec. 572; *Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156; *Minor v. Hill*, 58 Ind. 176, 26 Am. Rep. 71; *Winters v. Franklin Bank*, 33 Ohio St. 250; *Wilson v. Hayward*, 6 Fla. 171; *Wood v. Trask*, 7 Wis. 566, 76 Am. Dec. 230; *Funk v. McReynolds*, 33 Ill. 481. Even here, however, if the mortgage provides that on default in the payment of one of the notes all shall at once become due, upon such default all are entitled to be paid ratably. *Whitehead v. Morrill*, 108 N. C. 65, 12 S. E. 891; *Bushfield v. Meyer*, 10 Ohio St. 334; *Pierce v. Shaw*, 51 Wis. 316, 8 N. W. 209. But see *Horn v. Bennett*, 135 Ind. 158, 34 N. E. 321, 24 L. R. A. 800.

² *Lovell v. Cragin*, 136 U. S. 147, 10 Sup. Ct. 1024, 34 L. Ed. 372; *Eastman v. Foster*, 8 Metc. (Mass.) 19; *Perry's Appeal*, 22 Pa. 43, 60 Am. Dec. 63; *Penzel v. Brookmire*, 51 Ark. 105, 10 S. W. 15, 14 Am. St. Rep. 23; *Parker v. Mercer*, 6 How. (Miss.) 320, 38 Am. Dec. 438; *Dixon v. Clayville*, 44 Md. 573; *Jennings v. Moore*, 83 Mich. 231, 47 N. W. 127, 21 Am. St. Rep. 601.

³ 2 Min. Insts. 383; *McClintic v. Wise*, 25 Grat. (Va.) 454, 18 Am. Rep. 694; *Griggsby v. Hair*, 25 Ala. 327.

⁴ 2 Min. Insts. 373.

have been the intent. And so, although an assignment of the debt is an assignment of the mortgage, yet an assignment of the mortgage, unless it seem intended as an assignment of the debt, as *prima facie* it is, does not operate to transfer or extinguish the debt.⁵

But while the general rule is that an assignment or release of the mortgage to the mortgagor operates an extinguishment of the mortgage, merging it in his general ownership of the property mortgaged, a court of equity may intervene to prevent such merger or extinguishment, if such a course be to the advantage of the mortgagor and is not detrimental to the interests of creditors or other third parties, and is not repugnant to conscience.⁶

As to the form of the release, the doctrine at common law was that, wherever the obligation was under seal, the release must be by act as solemn, that is, under seal, in pursuance of the maxim, *Eodem modo quo oritur eodem modo dissolvitur*. If the promise were not under seal, it seems that it was only necessary to have a valuable consideration. But this doctrine is much shaken by the later American adjudications. However, it would be prudent to have the release always under seal.⁷

It must be observed, however, that if a mortgage or deed of trust has been duly registered, and thus made an incumbrance upon the land as against creditors and subsequent purchasers for value and without notice, there should likewise be entered upon the records the satisfaction and release of the same, in order that the title may thus be made clear upon the records.

§ 570. Mortgagor's Assignment of Mortgaged Land. If the mortgagor assigns the mortgaged land to one without notice by registry or otherwise of the existence of the mortgage, such assignee under the modern registry laws takes free from the mortgage.

If the assignee of the land takes it with notice of the mortgage, he takes subject thereto, and the land in his hands is liable for the mortgage debt, just as it would be had it remained in the hands of the mortgagor; but the purchaser of the land is not personally bound to pay the debt, unless he has expressly or impliedly agreed to pay it, as where he expressly assumes the payment of the mortgage or he purchases at a reduced consideration because of

⁵ 2 Min. Insts. 382, 383; *Martyn v. Mowlin*, 2 Burr. 978; *Row v. Dawson*, 1 Ves. Sr. 331, 2 White & Tud. Lead. Cas. Eq. 233; *Iaegé v. Bossieux*, 15 Grat. (Va.) 99, 76 Am. Dec. 189; *McClintic v. Wise*, 25 Grat. (Va.) 448, 536, 18 Am. Rep. 694; *Allen v. Patrick*, 97 Va. 521, 34 S. E. 451.

⁶ *Allen v. Patrick*, 97 Va. 521, 34 S. E. 451.

⁷ 2 Min. Insts. 385; *Bac. Abr. Release* (A) 1; *Blake's Case*, 6 Co. 44a; *Fowell v. Forest*, 2 Saund. 473, note (1); *Rogers v. Payne*, 2 Wils. 276.

the mortgage.⁸ If the assignee does thus assume the payment of the mortgage debt, he thereby becomes the principal debtor, and the original mortgagor is only liable subsidiarily, as a surety.⁹ And while the mortgagee may continue to hold the mortgagor personally liable upon his contract to pay the debt, notwithstanding the assumption of the mortgage by the purchaser of the land,¹⁰ he may also, it seems, hold the purchaser directly responsible, though he is not a party to the agreement between the mortgagor and the purchaser—a right based sometimes upon the principle that one may sue upon a contract to which he is not a party if it be made for his benefit,¹¹ and sometimes upon the theory of the subrogation of the mortgagee to the rights of the mortgagor (the surety) against the purchaser (the principal debtor).¹²

⁸ *Elliott v. Sackett*, 108 U. S. 132, 2 Sup. Ct. 375, 27 L. Ed. 678; *Litchfield v. Preston*, 98 Va. 530, 37 S. E. 6; *Osborne v. Cabell*, 77 Va. 467; *Strong v. Converse*, 8 Allen (Mass.) 557, 85 Am. Dec. 732; *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5; *Taylor v. Preston*, 79 Pa. 436; *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Finley v. Simpson*, 22 N. J. Law, 311, 53 Am. Dec. 252; *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; *Rice v. Sanders*, 152 Mass. 108, 24 N. E. 1079, 8 L. R. A. 315, 23 Am. St. Rep. 804; *Farmers' Nat. Bank v. Gates*, 33 Or. 388, 54 Pac. 205, 72 Am. St. Rep. 724; *Townsend v. Ward*, 27 Conn. 610; *Heid v. Vreeland*, 30 N. J. Eq. 591; *Thompson v. Thompson*, 4 Ohio St. 333.

⁹ *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118; *Osborne v. Cabell*, 77 Va. 467; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Paine v. Jones*, 76 N. Y. 274; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Nelson v. Brown*, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755; *Merriam v. Miles*, 54 Neb. 566, 74 N. W. 861, 69 Am. St. Rep. 731.

¹⁰ *Nelson v. Brown*, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755; *Poe v. Dixon*, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713; *Merriam v. Miles*, 54 Neb. 566, 74 N. W. 861, 69 Am. St. Rep. 731; *Flagg v. Geltmacher*, 98 Ill. 293.

¹¹ *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Poe v. Dixon*, 60 Ohio St. 133, 54 N. E. 86, 71 Am. St. Rep. 713; *Enos v. Sanger*, 96 Wis. 150, 70 N. W. 1096, 37 L. R. A. 862, 65 Am. St. Rep. 38; *Merriman v. Moore*, 90 Pa. 78; *Urquhart v. Brayton*, 12 R. I. 169; *Gilbert v. Sanderson*, 56 Iowa, 349, 9 N. W. 293, 41 Am. Rep. 103. See 15 Harvard Law Rev. 808.

¹² *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Osborne v. Cabell*, 77 Va. 462; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Wager v. Link*, 134 N. Y. 122, 31 N. E. 213; *Miller v. Thompson*, 34 Mich. 10; *Hopkins v. Warner*, 109 Cal. 136, 41 Pac. 868. See 15 Harvard Law Rev. 767, 787; 2 Tiffany, Real Prop. § 528.

When the assignee of the mortgaged land is not an absolute purchaser, but only a second mortgagee, who assumes the first mortgage, his assumption of the mortgage debt is to be viewed differently; for, the land not being his own, it cannot be supposed that he intended to make the debt his own, nor to indemnify the mortgagor and save him from his indebtedness, but only that he intends to lend the amount of the first mortgage to the mortgagor. In such case the first mortgagee has no personal claim against the second mortgagee, as he would if he were an absolute purchaser.¹³

§ 571. Same—Mortgagor's Assignment of Part of the Land.

If a mortgagor assigns to another part of the land mortgaged, retaining the rest, it is equitable and just—at least, in case the deed of conveyance contains covenants upon which the purchaser could hold the mortgagor responsible for defective title—that the land retained by the mortgagor should first be subjected to the mortgage debt, and that the alienee's portion be subjected only to the extent necessary to make good the deficit, and if under such circumstances the alienee pay the mortgage debt he is entitled to contribution or exoneration from the mortgagor to the extent of the value of the land retained by him.¹⁴ But the alienee is not entitled to exoneration out of the land retained by the mortgagor, if the deed contains no covenants of title or warranty or quiet enjoyment, etc., since in such case the alienee has no claim against the mortgagor, in the absence of fraud or mistake;¹⁵ nor, a fortiori, where the alienee assumes the mortgage debt.¹⁶

§ 572. Same—Successive Assignments of the Land in Parcels.

If the mortgagor, having aliened one portion of the mortgaged land with the consequences just depicted, should assign other por-

¹³ *Bassett v. Bradley*, 48 Conn. 234; *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Pardee v. Treat*, 82 N. Y. 385. See *Gaffney v. Hicks*, 131 Mass. 124.

¹⁴ 2 Min. Insts. 308; *Aldrich v. Cooper*, 2 White & Tud. Lead. Cas. Eq. 291 et seq.; *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 235; *Engle v. Haines*, 5 N. J. Eq. 186, 43 Am. Dec. 624; *Cumming v. Cumming*, 3 Ga. 460; *Lock v. Fulford*, 52 Ill. 166; *Caruthers v. Hall*, 10 Mich. 40.

¹⁵ 3 Pomeroy, Eq. Jur. § 1225; *Aldrich v. Cooper*, 2 White & Tud. Lead. Cas. Eq. 296, 303; *Aderholt v. Henry*, 87 Ala. 415, 6 South. 625, 6 L. R. A. 451; *Carpenter v. Koons*, 20 Pa. 222; *Steinmeyer v. Steinmeyer*, 55 S. C. 9, 33 S. E. 15; *Aiken v. Gale*, 37 N. H. 501.

¹⁶ 3 Pomeroy, Eq. Jur. §§ 1205, 1225; *Litchfield v. Preston*, 98 Va. 530, 37 S. E. 6; *Carpenter v. Koons*, 20 Pa. 222; *Welch v. Beers*, 8 Allen (Mass.) 151; *Bowne v. Lynde*, 91 N. Y. 92; *Johnson v. Zink*, 51 N. Y. 333; *Burger v. Grief*, 55 Md. 518; *Engle v. Haines*, 5 N. J. Eq. 186, 43 Am. Dec. 624; *Thompson v. Bird*, 57 N. J. Eq. 175, 40 Atl. 857; *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547.

tions of the land retained by him, such later assignee stands in the shoes of his assignor (the mortgagor) so far as the rights of the first alienee are concerned, and takes the land conveyed to him cum onere, so that the first alienee has against him all the rights of contribution and exoneration that he would have had against the land retained by the mortgagor.¹⁷ But as against the mortgagor this second alienee stands in the same position with reference to so much of the mortgaged land as the mortgagor still retains as did the first alienee upon the conveyance to him. Hence it follows that, if the mortgagor thus makes successive assignments of the mortgaged land to different persons, the various tracts are to be subjected in the inverse order of their alienation, beginning with any part of the mortgaged land, if any, which is retained by the mortgagor, next that portion last assigned, and so on.¹⁸ But this rule is dependent upon the right of the successive alienees to hold the mortgagor primarily responsible for the discharge of the lien. If the deed of conveyance contains no covenants, or there is an assumption of the mortgage by an alienee, no rights of contribution or exoneration arise against the mortgagor as to the land retained by him, and hence none will arise as against the subsequent alienees of such land.¹⁹

It is further to be observed, in connection with the subject of successive alienations of mortgaged land, that if the land be thus successively assigned in parcels, so that the equities of the owners of the respective parcels are unequal and the parcels are liable in the inverse order of alienation, and the mortgagee, having notice of these alienations, releases a parcel which is primarily responsible, he thereby discharges or releases those parcels which are secondarily liable in the order of their several liabilities to an extent equal to the value of the parcel first released.²⁰ And if the alienee of the latter parcel has assumed the payment of the whole lien, and he is thereafter released by the creditor, or with his consent, the property secondarily liable is thereby released altogether.²¹ But

¹⁷ 2 Min. Insts. 306 et seq.; 2 Tiffany, Real Prop. § 530.

¹⁸ 2 Min. Insts. 308. See *Rodgers v. McCluer*, 4 Grat. (Va.) 81, 47 Am. Dec. 715; *Jumel v. Jumel*, 7 Paige (N. Y.) 591; *Irvine v. Perry*, 119 Cal. 352, 51 Pac. 544; *Union Nat. Bank of Oshkosh v. Moline, Milburn & Stoddard Co.*, 7 N. D. 201, 73 N. W. 527.

¹⁹ See authorities cited, ante, § 571.

²⁰ *Lynchburg Perpetual Building Ass'n v. Fellers*, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851. See 3 Pomeroy, Eq. Jur. § 1226; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *George v. Wood*, 9 Allen (Mass.) 80, 85 Am. Dec. 741; *Gaskill v. Sine*, 13 N. J. Eq. 400, 78 Am. Dec. 105; *Paxton v. Harrier*, 11 Pa. 312.

²¹ *Lynchburg Perpetual Building Ass'n v. Fellers*, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851.

to this result it is necessary that the mortgagee have notice of the various alienations at the time he makes the release, and this notice is not to be found in the mere recordation of such subsequent alienations; for registry is only notice to creditors of the grantor (and a mortgagee is not a creditor ²²) or to subsequent purchasers, whereas the mortgagee is a prior purchaser.²³

§ 573. **Same—Assignments of the Land by Concurrent Alienations.** If the mortgagor alienes the mortgaged land to different persons by the same instrument, as by will, or by different instruments simultaneously or on the same day (the law knowing no fraction of a day), there are no priorities among the alienees, but all are on an equal footing as between themselves, and must contribute ratably to discharge the incumbrance.²⁴ And if the mortgagee, with notice of the alienations, releases one of the tracts concurrently subject to the lien, it seems that he thereby discharges the lien pro tanto from all the tracts, just as in the corresponding case of successive alienations above mentioned.²⁵

§ 574. **Same—Assignment of Mortgaged Land for Life of Assignee.** Where the mortgaged land is assigned or by any means comes into the hands of a tenant for life, with remainder or reversion in another in fee, the tenant for life will be obliged to pay the annual interest; but he cannot be compelled to contribute towards the payment of the principal where the mortgage is not foreclosed in the lifetime of the tenant for life. When there is a foreclosure in the lifetime of the tenant for life, the rule formerly was that the tenant for life should always pay one-third, and the remainderman two-thirds of the money. This, however, has been substituted by a more equitable procedure, based upon the fact that it is the duty of the tenant for life to keep down the interest during his life. This, together with the life tenant's expectation of life, derived from the tables of mortality, furnishes a basis of computation, as has been fully explained in connection with the subject of dower.²⁶

§ 575. **Priorities as between Mortgages—General Rule.** The general rule of the common law (independently of the registry

²²Ante, § 532.

²³Lynchburg Perpetual Building Ass'n v. Fellers, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851.

²⁴2 Min. Insts. 307, 308; Alley v. Rogers, 19 Grat. (Va.) 366, 388.

²⁵3 Pomeroy, Eq. Jur. § 1226; Parkman v. Welch, 19 Pick. (Mass.) 231; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; Birnie v. Main, 29 Ark. 591; Taylor v. Short, 27 Iowa, 361, 1 Am. Rep. 280; Johnson v. Rice, 8 Me. 157; Deuster v. McCamus, 14 Wis. 307.

²⁶Ante, § 203; 2 Min. Insts. 387, 143; Story, Eq. Jur. § 487.

laws) touching the order in which mortgages and other liens are to be paid is embraced in two maxims of the courts of equity: (1) As between equal equities the first in point of time prevails (*qui prior est in tempore potior est in jure*), so that, if all the liens are merely equitable or statutory liens and the equities are equal, they should be paid in the order of their creation, so far as the fund to be subjected will permit;²⁷ and (2) where the equities are equal, the law (that is, the legal title) will prevail, so that, if any one of the incumbrancers is or becomes possessed of the legal title, he occupies an important vantage ground, from which he cannot be dislodged except to subserve a superior equity, which superiority is not created merely by priority in point of time, but arises from the fact of notice of an equity at the time of acquiring the title, or fraud, deceit, or gross negligence, etc., by which another is induced to acquire the equity.²⁸

From these principles the general rule of priority may be deduced, namely, that one having an equity or lien is preferred even to him who holds the legal title, and a fortiori to those who merely hold other equities, if the former is superior, that is, if the legal title or the other equities are acquired with notice of the former equity, or if the creation of the former has been induced by the fraud or deceit of the other parties or created by their agreement or with their consent, all of which circumstances render such equity superior to the others and even to the legal title. But if there are no such circumstances to create a superiority, and the equities are equal, the first equity in the direct order of their creation will take precedence over all other mere equities, but will be postponed to the claim of him who has the legal title²⁹ (or perhaps the best right to call for it).³⁰

Most of the equities that may arise in modern times come within the registry laws and are required to be recorded as against subsequent purchasers of the land subject to the equity for value and without notice and as to creditors; and if the statutes are complied with and the equities recorded, the registry is notice to such third parties of their existence, while if not registered the statutes pronounce them void as to such third parties. Hence there is no longer the same opportunity as formerly for equities upon common-law principles to be superior to others prior in point of time or to the legal title; if superior, they are usually so because of the statutes of

²⁷ 2 Min. Insts. 363, 364; 2 Th. Co. Lit. 56, note (L, 1); 2 Bl. Com. 160, note (13).

²⁸ 2 Min. Insts. 364. ²⁹ 2 Min. Insts. 364 et seq. ³⁰ 2 Min. Insts. 368.

registry, and the result will be controlled by those statutes, not by the general principles of equity.

Still there are even now equities which are not covered by the registry laws, as in the case of resulting, implied, and constructive trusts,³¹ transfers of after-acquired title by estoppel,³² and others that might be mentioned. To such the general principles above submitted are applicable in their entirety, unmodified by the registry laws.

§ 576. **Same—Applications of General Rule.** We shall consider the application of the principles contained in the preceding section to the following cases: (1) Subsequent incumbrance made superior to a prior one, by reason of the acquisition of the legal title; (2) subsequent incumbrance made superior to a prior one by reason of the misconduct of the prior incumbrancer; (3) subsequent incumbrances rendered superior to prior by reason of failure to record the prior under the registry statutes; and (4) equities rendered superior to the legal title, by reason of the acquisition of the latter with notice of the former.

§ 577. **Same—1. Later Incumbrance, Aided by Legal Title, Preferred to Incumbrance Prior in Point of Time—A. Where Later Incumbrancer Gets Possession of the Title Deeds.** The rule of the court of equity is never to deprive a party of any legal advantage, unless at the instance of some one having a superior equity. And in order that this legal advantage shall avail it is necessary that the party claiming it should have acquired his equity without notice of the prior equity, for otherwise such prior equity is the superior, and the court will not permit the legal title to prevail against it. It is only where the equities are equal that the law prevails.³³

In England, the possession of the title deeds amounts to the legal title, or at least they give an important legal advantage, of which a subsequent incumbrancer without notice of a prior lien will not be deprived by a court of equity, unless he is paid his money. Indeed, the first incumbrancer, by voluntarily leaving the title deeds in possession of the debtor, enables him to commit a fraud, for the consequences of which he should suffer rather than the innocent creditor who has trusted to the usual evidence of ownership.³⁴

But in this country the registry laws obviate any advantage from the possession of the title deeds.

§ 578. **Same—B. Where First Conveyance is Defective.** If a subsequent incumbrancer obtain a valid conveyance, he becomes

³¹ Ante, § 413 et seq.

³² Post, § 1066.

³³ 2 Min. Insts. 367.

³⁴ Post, § 580; 2 Min. Insts. 367; Bac. Abr. Mortgage (E, 3); Head v. Eger-ton, 3 P. Wms. 280.

thereby possessed of the legal title which failed to pass under the first invalid conveyance, and consequently if, when he advanced his money and took his lien, he had no notice of the previous defective conveyance, he has priority over it. In this instance a subsequent mortgagee would have the advantage of a subsequent incumbrancer by judgment or attachment, for the former is a purchaser and advanced his money on the faith of the land itself, while the latter is a creditor merely and can only subject such interest as the judgment or attachment debtor actually has, and the judgment debtor being obliged in conscience to make the defective conveyance good, the creditor will be postponed to the defective conveyance.³⁵

§ 579. Same—C. Where the Later Incumbrancer Acquires the Legal Title—Tacking. The general doctrine is that the incumbrancer who has the legal title, in whatever order he may stand in the succession, if he took his security without notice of the prior equities is entitled to priority of satisfaction. A court of equity will not deprive him of the legal advantage he has gained save in favor of an equity superior to his own.³⁶

Upon this principle, namely, that where equities are equal the legal title will prevail, a later incumbrancer, without notice of an intermediate lien, may buy up a first mortgage (the first mortgagee having the legal title) and tack his later incumbrance thereto, thus bringing such later incumbrance ahead of the intermediate equity which was prior in time. This kind of tacking must be carefully distinguished from the other sorts already mentioned,³⁷ which depend upon quite different principles.

Thus, if a third mortgagee (and therefore a mortgagee of the equity of redemption only), who has advanced his money and taken his security without notice of a second mortgage (also of the equity of redemption) or other equity, shall procure an assignment to himself of the first mortgage (which alone is the mortgage of the legal title), he will be allowed to tack on his third mortgage to his first, so that a court of equity will constrain the second mortgagee or other holder of the equity to redeem both, before he can charge his debt on, or claim his equity in, the mortgaged subject. In the lan-

³⁵ 2 Min. Insts. 368; Bac. Abr. Mortgage (E, 3); Withers v. Carter, 4 Grat. (Va.) 411, 50 Am. Dec. 78.

³⁶ 2 Min. Insts. 368; Basset v. Nosworthy, 2 White & Tud. Lead. Cas. Eq. 69, 70, et seq.; Williamson v. Gordon, 5 Mumf. (Va.) 257; Mutual Assur. Society v. Stone, 3 Leigh (Va.) 236, 238; Beck v. De Baptist, 4 Leigh (Va.) 357; Evans v. Roanoke Sav. Bank, 95 Va. 294, 28 S. E. 323, 3 Va. Law Reg. 705, note; Wasserman v. Metzger, 105 Va. 744, 54 S. E. 893, 7 L. R. A. (N. S.) 1019.

³⁷ Ante, § 552 et seq.

guage—more significant than elegant—of Lord Hardwicke, the third mortgagee will thus squeeze out the second holder of the equitable interest, at least until the third as well as the first mortgage is satisfied.²⁸

In order that this advantage may be enjoyed by the third or subsequent incumbrancer, these circumstances must concur: (1) He must have had no notice of the intermediate incumbrance or incumbrances at the time he advanced his money and took his security; whether he had it before he got in the legal title is immaterial; (2) he must have advanced his money on the faith of the land itself, and not as a mere general creditor, and therefore whilst a third incumbrance, being a mortgage, may be tacked to a first being a judgment (in cases where the judgment creditor has the legal title and possession of the land under the writ of *elegit* or otherwise), yet if the third is a judgment or attachment lien, it is not capable of being tacked to the first, being a mortgage, so as to squeeze out the intermediate lien or equity; and (3) he must acquire not merely a previous equity, but the legal title, and hence if there are four mortgages on the same land, the first only passing the legal title, the acquisition by the fourth mortgagee of the second mortgage would not permit him to squeeze out the third mortgagee. To do that, he must acquire the first mortgage; that is, the legal title.²⁹

But in this country, if the intermediate equity is of a nature to be recorded under the registry statutes, the effect of those statutes is practically to tear up the doctrine of tacking by the roots; for if the statutes are complied with and such intermediate equity is recorded, the registry is constructive notice to the third mortgagee, and the first requirement above mentioned is abrogated. On the other hand, if such intermediate equity is not duly recorded, it is void, by the very terms of the statutes themselves, as to such third mortgagee, and he has no occasion to resort to the doctrine of tacking in order to gain a superiority already given him by those statutes.

But if the intermediate equity be a resulting, implied or constructive trust, or any other equitable charge or interest not required to be recorded under the registry laws, there seems to be no reason why the doctrine of tacking should not apply as at common law.

²⁸ 2 Min. Insts. 368, 369; 2 Bl. Com. 160, note (13); 4 Kent, Com. 176 et seq.; *Marsh v. Lee*, 2 Vent. 337, 1 White & Tud. Lead. Cas. Eq. 423, 425, et seq.; *Edmunds v. Povey*, 1 Vern. 187; *Wortley v. Birkhead*, 2 Ves. Sr. 571; *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Bassett v. Nosworthy*, 2 White & Tud. Lead. Cas. Eq. 90 et seq.

²⁹ 2 Min. Insts. 369, and cases cited supra. See *McClanachan v. Siter*, 2 Grat. (Va.) 280.

§ 580. **Same—2. Later Incumbrance Made Superior by Misconduct of Prior Incumbrancer.** In England, if a first mortgagee voluntarily leaves the mortgagor in possession of the title deeds, whereby he enables him to perpetrate a fraud upon a later mortgagee or other lienor or incumbrancer, who is deceived by that indicium (in England) of unincumbered ownership, the latter will be preferred. But in this country, in consequence of our registry laws, the mortgagor's possession of the title deeds could not thus betray any subsequent purchaser or mortgagee, and the reason for the law having ceased, the doctrine has ceased to exist.⁴⁰

There is, however, another sort of misconduct on the part of the prior mortgagee or incumbrancer, which here, as well as in England, would postpone him, namely, his resorting to fraud, artifice or misrepresentation to conceal, or his forbearing to disclose, his own mortgage or interest, in order to induce or encourage another person to advance money on the same land (the fact that he is merely a witness to the subsequent mortgage does not of itself prove that he was aware of its contents which in practice is often not the fact). The later equity is thus made superior to his claim, whether it consist of the legal title or a mere equity.⁴¹

§ 581. **Same—3. Later Incumbrance Made Superior by Failure to Record Prior Incumbrance under Registry Statutes.** Most of the liens, incumbrances or interests that may arise in connection with land come within the scope of the registry statutes, which prescribe that unless they are recorded, they shall be void as to subsequent purchasers (including creditors secured by mortgage or deed of trust) for value and without notice, as in the case of the liens of judgments, attachments, or *lis pendens*, or else void as to both subsequent purchasers for value and without notice and as to all creditors (that is, lien creditors) prior or subsequent, with or without notice (as in the case of mortgages, deeds of trust, conveyances and contracts to convey).

In case of such liens, incumbrances or interests, therefore, by the terms of these statutes, a later transaction may be superior to one earlier in time by reason of the failure to record it in accordance with the registry laws.⁴²

§ 582. **Same—4. Equities Superior to Legal Title, if Latter Acquired with Notice of the Former.** The general principle control-

⁴⁰ 2 Min. Insts. 366; *Kelly v. Lehigh Mining & Mfg. Co.*, 98 Va. 408, 36 S. E. 511, 81 Am. St. Rep. 736; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. (N. Y.) 603.

⁴¹ 2 Min. Insts. 366; *Beckett v. Cordley*, 1 Bro. Ch. 353. See post, § 1067.

⁴² 1 Jones, Mortgages, § 456 et seq.

ling such cases has already been illustrated many times in the course of this work, and need not be dwelt upon here. Thus it has been shown that one who purchases from a trustee, with notice of the trust, takes subject thereto, while he takes free from the trust if he purchases without notice thereof.⁴³

But some very curious and difficult cases of triangular duels between lien creditors sometimes result from this principle.

Thus, in *Ingram v. Pelham*,⁴⁴ an equity (a) rested upon land which was prior in point of time to another equity (b) upon the same land. The owner of the land mortgaged it to P., who thus took the legal title, and who had notice of equity (b), but not of equity (a); so that (a) was superior to (b), because prior in time, (b) was superior to the mortgage because the mortgagee had notice thereof, and the mortgage was superior to (a) because the mortgagee had no notice thereof. It was held by Lord Hardwicke, the estate being insufficient to satisfy all the claims, that P. took the mortgage subject to the equity (b) of which he had notice, and that (b) thus obtained priority over (a), to which otherwise it would have been postponed.

§ 583. Application of Payments Made upon Mortgage Debt. Partial payments made generally on a mortgage, without designating how they are to be applied, are in general to be appropriated first to extinguish any interest which may be in arrear, that being the recompense to the creditor for the damage sustained by the debtor's default; and it has been said that this application, which is undoubtedly just, cannot be altered even by consent of the parties. This, however, can scarcely be reconciled with principle. The debtor who makes a voluntary payment can always direct its application, if he thinks fit so to do, since, if his wishes are not indulged, he may forbear to pay. If, therefore, the debtor shall in-

⁴³Ante, § 434 et seq.

⁴⁴1 Ambl. 153; 2 Min. Insts. 364. Even more difficult problems may present themselves under the registry laws. Thus, let us suppose O. the owner of Blackacre, the value of which is x. He executes a deed of trust upon it to secure a debt (a) due to A., the deed being unrecorded. He then makes another deed to secure debt (b) due to B., who has actual notice of A.'s deed. B.'s deed is duly recorded. O. then makes a third deed of trust on the same land to secure debt (c) due to C., who takes without notice of A.'s unrecorded deed, but with constructive notice of B.'s recorded deed. Here, it will be observed, A.'s title (prior in time) is superior to B.'s, because B. has actual notice thereof; B.'s title is superior to C.'s, because C. has notice thereof; and C.'s title is superior to A.'s because C. has taken without notice thereof.

The student is recommended to tax his ingenuity and reasoning powers in the solution of the foregoing problem.

sist at the time that a voluntary payment made by him shall go to the principal and not to the interest, if the creditor accepts the money on those terms, he must comply with the conditions. This is, indeed, only a branch of the doctrine of the application of payments generally, which may be thus summed up: Where several debts are embraced by the parties in one statement, general payments, unappropriated by the debtor at the time of making them, are to be applied to the demands in the order of priority as they stand in the statement. Where the demands are several and distinct, payments unappropriated by the debtor at the time are to be applied, not with a view to the particular advantage of either party, but according to the justice of each individual case.⁴⁵

⁴⁵ 2 Min. Insts. 387, 388; Clark, Cont. § 234.

CHAPTER XXIV.

EQUITABLE LIENS.

- § 584. Lien Implied from Deposit of Title Deeds.
- 585. Mortgages of Equitable Interests.
- 586. Implied Vendor's Lien for Unpaid Purchase Money.
- 587. Waiver of Vendor's Lien.
- 588. Vendee's Lien for Purchase Money Paid under Unfulfilled Contract of Sale.

§ 584. **Lien Implied from Deposit of Title Deeds.** To allow a mortgage to be created by the mere deposit of the title deeds—that is, by parol, and by an agreement merely implied—is so far to repeal the statute of conveyances (in England, 29 Car. II, c. 3, §§ 1, 2, 3). It was first declared to be admissible in *Russell v. Russell*,¹ although a foundation for it had been laid in *Hales v. Van Berchem*.² The decision has been often lamented, although constantly recognized as a binding authority in England, and in consequence of being a subsisting part of the equity jurisprudence of the mother country has found no inconsiderable acquiescence in the United States, particularly in New York, South Carolina, and Mississippi.³

It is agreed, however, that the doctrine, where it prevails at all, shall not be extended beyond the letter of the precedents, and that, in order to create the lien, there must be an actual and bona fide deposit (and not a mere agreement to make deposit) of the title deeds with the mortgagee himself. And it is also true that no such equitable mortgage will, in any case, avail against a subsequent mortgage, without notice of the deposit.⁴

In this country, the practice in question, so far at least as creditors and subsequent purchasers for value and without notice are concerned, is justly regarded as at war with the statute of registry.

In England, where there are no general registry laws, the possession of the title deeds is the only, and for the most part a sufficient, guaranty that lands have no previous incumbrance upon them. Hence to deposit the title deeds is at all events to prevent the owner of the land from defrauding any one else. With us,

¹ 1 Bro. Ch. 269.

² 2 Vern. 617.

³ 2 Min. Insts. 353; 3 Pomeroy, Eq. Jur. §§ 1265, note, 1266; 2 Story, Eq. Jur. § 1020; *Russell v. Russell*, 1 Bro. Ch. 269, 1 White & Tud. Lead. Cas. Eq. 457 et seq., 465 et seq.; *Ex parte Corning*, 9 Ves. 115; *Ex parte Wetherell*, 14 Ves. 606.

⁴ 2 Min. Insts. 353; 4 Kent, Com. 151; 2 Story, Eq. Jur. § 1020.

however, the dependence, in order to give notice of previous incumbrances and conveyances, is altogether upon the registry acts, and to permit a mortgage to be created by a deposit of the title deeds would, as to third persons, wholly frustrate the wise intent of those laws. Hence it is regarded as established that, however it may be as between the parties, there can be no such security as against a subsequent bona fide purchaser or incumbrancer, or a creditor.⁵

But as between the original parties it would seem that it should create an equitable mortgage, for the depositor of the title deeds could not recover the muniments of title thus deposited in an action at law until he had complied with the condition upon which they are to be returned, namely, the payment of the debt, nor would a court of equity give him relief until he had done equity to his creditor by discharging the obligation which the deposit was intended to secure.⁶

§ 585. Mortgages of Equitable Interests. Under this head are to be included, not only actual and express mortgages of existing equitable interests, but also agreements, whether express or implied, to hold or to transfer lands as a security for money. As equity looks upon that which is agreed, or ought to be done, as actually done, it is obvious enough that, when a debtor promises in writing to secure money due from him by mortgage, a court of chancery will enforce a specific execution of the agreement, or what is the same thing in effect, will treat the agreement itself as a mortgage, and decree a sale of the property to satisfy the debt. A power of attorney to the creditor, authorizing him to sell for the purpose of paying the debt, may, to some extent, have the same effect, at least as long as it remains unrevoked by the express act of the maker, or impliedly by his death.⁷

A similar equitable mortgage may arise by a grantee's accepting a conveyance of land in consideration of paying a debt therein named. Nay, wherever it appears, by writing signed by the party to be charged, that for a valuable consideration, such as an existing debt, a debt at that time first contracted, or otherwise, he intends to charge his property as security for money, whatever the form of the instrument, the court of equity will fully effectuate the intentions of the parties concerned. Hence mere promises,

⁵ 2 Min. Insts. 354; 3 Pomeroy, Eq. Jur. §§ 1265, note, 1266; Russel v Russel, 1 Bro. Ch. 269, 1 White & Tud. Lead. Cas. Eq. 466.

⁶ 3 Pomeroy, Eq. Jur. §§ 1265, note, 1266.

⁷ 2 Min. Insts. 352; Huston v. Cantril, 11 Leigh (Va.) 136, 173, 178; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589; Id., 1 Pet. 1, 7 L. Ed. 27.

in writing, to subject property to debts, powers of attorney, deeds imperfectly executed, conveyances to third persons on condition to pay the grantor's debts, and other written papers, have been held to create equitable mortgages in the contemplation of courts of equity.⁸

But an agreement by a debtor to pay a debt out of the proceeds of the sale of a particular piece of property constitutes neither an assignment of, nor a lien upon, such proceeds, but is only the personal covenant of the debtor. Nor can such agreement affect a purchaser of the property, who was ignorant of it, nor an assignee of the bonds given for the purchase price, who had no notice of it.⁹

Existing equitable interests may also be mortgaged, as, for example, equities of redemption, or interests, depending upon contracts to convey, not carried into grant.¹⁰

§ 586. Implied Vendor's Lien for Unpaid Purchase Money. At common law, the grantor of land, upon a conveyance thereof, the grantee having left unpaid some or all of the purchase price, had in equity an implied lien upon the land for such unpaid purchase money—a lien which bound, not only the vendee, but all persons claiming under him otherwise than for value and without notice, although the implication of a lien was susceptible of rebuttal by showing from the circumstances of the case that no lien was intended to be reserved, as by the taking of other real or personal security, or when the object of the sale was not money, but some collateral benefit.¹¹

While this lien is recognized in most of the states of this country, it has, in several, been abolished as an implied lien, although it may be expressly reserved in writing.¹²

The lien affects subsequent purchasers with notice.¹³ But a mere recital in a conveyance that the purchase money or part thereof remains unpaid is sufficient to bind a subsequent purchaser.¹⁴

⁸ 2 Min. Insts. 352; *Russel v. Russel*, 1 Bro. Ch. 269, 1 White & Tud. Lead. Cas. Eq. 467; *Dulaney v. Willis*, 95 Va. 606, 29 S. E. 324, 64 Am. St. Rep. 815.

⁹ *Evans v. Rice*, 96 Va. 50, 30 S. E. 463.

¹⁰ 2 Min. Insts. 352.

¹¹ Ante, § 418; 2 Min. Insts. 354; 4 Kent, Com. 152 et seq.; 2 Story, Eq. Jur. § 1217 et seq.; *Mackreth v. Symmons*, 15 Ves. 329, 1 White & Tud. Lead. Cas. Eq. 447; *Crampton v. Prince*, 83 Ala. 246, 3 South. 519, 3 Am. St. Rep. 718; *Seymour v. McKinstry*, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94; *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272; *Peters v. Tunell*, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252.

¹² See 2 Washburn, Real Prop. (6th Ed.) § 1028.

¹³ *Cator v. Pembroke*, 1 Bro. Ch. 301, 302, and note.

¹⁴ *Hiestler v. Green*, 48 Pa. 96, 86 Am. Dec. 569.

§ 587. **Same—Waiver of Vendor's Lien.** The vendor's lien may be waived; and while a vendor may take as much additional security as he pleases, as long as his intention to do so is clearly apparent,¹⁵ a waiver of the lien is implied *prima facie* by the taking of other security, such as a mortgage on other land, the note of the vendee indorsed by another, or any kind of collateral.¹⁶

But in those states where the retention of the lien is required to be expressed in writing, no implication of waiver arises from the acceptance of additional security contemporaneously with the reservation.¹⁷ Nor will the taking of new security after the lien has been reserved defeat the lien, unless the intention be that the new obligation shall substitute the vendee's.¹⁸

§ 588. **Vendee's Lien for Purchase Money Paid under Unfulfilled Contract of Sale.** Upon a contract for the sale of land, the vendee has in equity a lien upon such land for any payments made by him in case the contract should fail ultimately to be carried out because of the vendor's fault.

This lien is analogous to the vendor's lien just described.¹⁹

¹⁵ 2 Reeves. Real Prop. § 744.

¹⁶ 4 Kent, Com. 153; Donegan v. Hentz, 70 Ala. 437.

¹⁷ Jordan v. Buena Vista Co., 95 Va. 285, 28 S. E. 323.

¹⁸ Carper v. Marshall, 98 Va. 438, 36 S. E. 526.

¹⁹ Elterman v. Heyman, 192 N. Y. 113, 84 N. E. 937; Craft v. Latourette, 62 N. J. Eq. 206, 49 Atl. 711.

PART III.

THE VARIOUS ESTATES IN LAND, AS RESPECTS THE TIME OF ENJOYMENT.

§ 589. **Preliminary Outline of Discussion—Estates in Possession (Executed Estates) and Estates in Expectancy or in Futuro (Executory Estates).** All estates in land, whether in fee simple, for life or for years, whether absolute or qualified by condition, incumbrance or lien, may consist of such as are either in possession or in expectancy.

Of estates in possession (which are sometimes called estates executed), whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency as in the case of estates executory, there is little or nothing peculiar to be observed. All the estates hitherto spoken of are of this kind; for in laying down general rules we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the most abstruse learning in the law.²⁰

Of estates in expectancy or in futuro (often called executory estates) there are three sorts; two very well known to the common law, namely, remainders and reversions, and a third, called executory limitations, originating in those statutes whereby estates of freehold may be created without actual livery of seisin—that is, the statute of uses,²¹ and the statute of wills.²²

At common law, no estates of freehold in lands could be created to commence in futuro otherwise than by way of remainder or reversion, which required a preceding estate. The reason was that no such freehold could pass without livery of seisin, which, from its nature, must operate immediately, or not at all, and because, moreover, if the livery operated to divest the freehold out of the grantor (as it must do, if it operated at all), the freehold would be in abeyance before the time came for it to vest in the grantee, which would have been fraught with these serious mischiefs: First, that the superior lord would not have known on whom he was to call for the military services due for the feud, whereby the defence of the realm would have been weakened; and secondly, that a stranger who claimed a right to the land would not

²⁰ 2 Min. Insts. 388; 2 Bl. Com. 163.

²¹ 27 Hen. VIII, c. 10.

²² 32 Hen. VIII, c. 1, explained by 34 Hen. VIII, c. 5.

have known against whom to bring his *præcipe*, or real action, to recover it, as no real action could be brought against any person but the actual freeholder. Similar, but less potent, considerations of policy led the courts also to discountenance as much as possible, but not peremptorily to forbid, the abeyance of the inheritance, of which more will be said presently.²³

And for analogous reasons, a freehold, once vested, could not be divested at common law and shift over to another upon the happening of a future contingency, because that would be to allow a freehold upon condition subsequent to be terminated by the mere happening of the condition, without the re-entry of the grantor or his heirs, which the common law forbids.²⁴

But under the statutes above mentioned future estates of either description may be created freely, which are known generally as executory limitations.

In this part of the work, therefore, we shall consider three great heads, namely: (1) Remainders; (2) reversions; and (3) executory limitations.

²³ 2 Min. Insts. 389; 3 Th. Co. Lit. 103, note (G); 2 Bl. Com. 165, 166.

²⁴ Ante, 481; post, §§ 595, 680.

CHAPTER XXV.

REMAINDERS.

- § 590. Nature of a Remainder.
- 591. Essential Characteristics of Remainders—Enumeration.
- 592. I. Necessity for Precedent Particular Estate, Whose Regular Expiration Remainder must Await.
- 593. II. Remainder must be Created by Same Conveyance and at Same Time as Particular Estate.
- 594. III. Remainder must Vest during Continuance of Particular Estate or at the Very Moment of Its Termination.
- 595. IV. No Remainder can be Limited after a Fee Simple.
- 596. Nature of Vested Remainders.
- 597. Nature of Contingent Remainders.
- 598. Several Classes of Contingent Remainders, with Exceptions Thereto.
- 599. First Class—Contingent Remainders Limited upon an Uncertain Event.
- 600. Limitations, if Possible, Construed to be Certain, so as to Make Estates Vested Rather than Contingent.
- 601. Words Construed as Importing Time of Enjoyment and Not Contingency.
- 602. Second Class—Contingent Remainders Limited to a Certain Person and on a Certain Event, but without Present Capacity to Take Effect in Possession.
- 603. Same—Exception to Second Class of Contingent Remainders.
- 604. Third Class—Contingent Remainders Limited to Persons Unascertained or Not in Being.
- 605. Exceptions to Third Class of Contingent Remainders—Enumeration.
- 606. First Exception—Remainder to a Class of Persons.
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§ 590. **Nature of a Remainder.** A remainder is defined to be "what is left of an entire grant of lands or tenements after a preceding part of the same grant or estate has been disposed of, whose regular expiration the remainder must await."¹

Thus, A. by a single deed grants land to Z. for ten years, then to W. for life, and after W.'s death to X. in fee simple. Here the entire estate granted is the whole fee simple, out of which is first carved a particular estate for ten years, which is given to Z.; and then a further portion is carved out and given to W., which, relatively to Z.'s estate, is a remainder; and when those previous interests have been disposed of, the remnant of the contemplated estate is given by way of remainder to X.; W.'s estate awaiting the regular determination of Z.'s and X.'s that of both Z.'s and W.'s.²

Again, if A., seised in fee simple, proposes to make an estate in the aggregate of one hundred years, and gives the land to Z. for twenty years, and after the determination of that estate, to W. for eighty years, W.'s estate is a remainder, being the remnant of the entire estate of one hundred years, after the disposition made of the preceding particular estate of twenty years given to Z., the regular expiration of which particular estate the remainder awaits.

After the expiration of both Z.'s estate and W.'s the land returns or reverts to the grantor, and so the interest remaining thus in the grantor, is styled a reversion.

The student will perceive, therefore, that whilst a remainder is the remnant of the estate which the grantor parts with, the reversion is the remnant left in him, which he does not part with.

¹ 2 Min. Insts. 389; 2 Th. Co. Lit. 126; Fearne, Rem. 3, note (C); 2 Bl. Com. 164.

² 2 Min. Insts. 389, 390.

The term remainder is a relative term, having relation to the whole estate which the grantor has it in mind to dispose of, and also to the part which is given to the particular tenant, whilst the remainder goes to the remainderman.³

§ 591. Essential Characteristics of Remainders—Enumeration. It is very important that the student should familiarize himself with the essential characteristics of a remainder, and particularly that he should observe how immediately they all arise out of the definition above stated. Those characteristics are as follows: (1) That there must be a precedent particular estate, whose regular determination the remainder must await; (2) the remainder must be created by the same conveyance, and at the same time as the particular estate; (3) the remainder must vest in right, during the continuance of the particular estate, or eo instanti (at the very instant), that it determines; and (4) no remainder can be limited after a fee simple.

§ 592. Same—I. Necessity for Precedent Particular Estate, Whose Regular Expiration Remainder must Await. This necessary feature of a remainder arises, as do all the rest to be mentioned, out of the definition before given. The definition describes a remainder as the remnant of the whole contemplated gift after a part has been disposed of. It follows, therefore, of course, that there must be that precedent part, in order to fulfill the definition. The particular estate is so called (from particula), as being, in general, only a small part of the whole estate granted, of which the remainder is another, and commonly a greater part; the two together, or the several parts, making up the whole. But it is equally called the particular estate, though it should be much the greater part of the whole. Thus, in case of a grant to A. for ninety-nine years, and then to Z. for one year, Z.'s interest would be a remainder, and A.'s the particular estate, though consisting of ninety-nine parts in the one hundred of the whole.⁴

It is customary to say that the particular estate supports the remainder, but this is a mere figure of speech, which leads to inaccurate deductions, and should be eschewed. There is no such relation between the particular estate and the remainder as that of a support and thing supported, but simply of two parts of one whole, the existence of the latter of which necessarily, *ex vi termini*, supposes that of the former.⁵

And therefore a vested remainder is in no wise affected by the destruction of the particular estate after the remainder has once vested by good title.⁶

³ See 2 Min. Insts. 390.

⁴ 2 Min. Insts. 390, 391.

⁵ 2 Min. Insts. 391; 2 Bl. Com. 165.

⁶ 2 Min. Insts. 391, 392; 2 Th. Co. Lit. 134; post, § 635.

The last clause of the proposition, that the remainder awaits the regular expiration of the particular estate, is simply a part of the definition of a remainder. It is said to follow, moreover, from a doctrine formerly explained, that an estate of freehold, once vested, cannot, at common law, be prematurely determined, save by the re-entry of the grantor or his heirs, in pursuance of a condition broken, which re-entry revests the land in the grantor or his heirs, as of their original estate, thereby defeating all subsequent limitations, as well as the first estate. This, however, is true only where the particular estate is an estate of freehold; and it surely suffices to refer the proposition to the definition of a remainder.⁷

As to the quantity of the particular estate, it is worth while to observe that it must be less than a fee simple, being carved out of it, and that three sorts of particular estates only can be created, namely, an estate for years, an estate for life (but not an estate at will, which is looked upon as too slender and precarious for the purpose), and an estate tail, growing out of the statute *de donis*, 13 Edw. I, c. 1. And where the whole estate intended to be conveyed, taking its several parts together—that is, the particular estate and the remainder or remainders—amounts to a freehold, there must have been at common law livery of seisin made to the particular tenant, although he were only tenant for years; not, indeed, for his own benefit, for his estate alone did not require it, but for the benefit of them in remainder, to whom livery could not be directly made, as they were not entitled to the immediate possession, but all the parts being one estate, the livery to the tenant for years enured to the whole succession of interests. Thus, where one leases to A. for three years, with remainder to B. in fee, and makes livery of seisin to A., here, by the livery, the freehold is immediately created, and vested in B., during the continuance of A.'s term of years. The whole estate passes at once from the grantor to the grantees, and the remainderman is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it is indeed deferred till hereafter; but it is to all intents and purposes an estate commencing in *præsenti*, though to be occupied and enjoyed in *futuro*.⁸

⁷ 2 Min. Insts. 391, 267; 2 Th. Co. Lit. 97; Fearne, Rem. 249, 261; ante, §§ 491, 480, et seq.

⁸ 2 Min. Insts. 391, 392; Fearne, Rem. 3, note (C); 2 Th. Co. Lit. 127; 2 Bl. Com. 166. In such case, at common law, where the particular estate was less than freehold, the livery of seisin did not enure to invest a freehold, or indeed any other estate, in the particular tenant who was merely put into possession of the land as tenant for years, etc., holding the freehold thereof as agent or bailiff of the remainderman to whom the freehold was

Whether the particular estate shall be an estate for life or an estate for years is not material, except in the case of a contingent remainder of freehold, which must always be preceded by a particular estate of freehold, because, as we have seen, the freehold must pass out of the grantor, by the livery of seisin, at the time when the remainder is created, and must vest somewhere, the law not permitting it to be in abeyance; but when the remainder is contingent, it cannot vest in the remainderman during the suspense of the contingency, and therefore it must vest in the particular tenant, or nowhere, and hence the estate of such tenant must be of a freehold nature. And this proposition is as true of remainders created by way of devise, use, or grant, as those arising out of conveyances at common law.⁹

§ 593. Same—II. Remainder must be Created by Same Conveyance and at Same Time as Particular Estate. This characteristic is the inevitable result of the definition of a remainder. The remainder and the particular estate cannot possibly be one and the same estate, as the definition requires, unless they are created by the same conveyance, and commence or pass out of the grantor at the same time. Hence (and because also the first trait above named would not be otherwise fulfilled), if the particular estate be void in its creation, the remainder is always defeated. But when the remainder is vested in interest, and not contingent, the subsequent destruction of the particular estate (the same having been good when created), does not affect the estate in remainder, of which Lord Coke gives several instances. Thus, if the lessor disseise A., his tenant for life, and make a lease to B. for the life of A., remainder to C. in fee, albeit A. re-enter, and defeat the estate for life, yet the remainder to C., being once vested by good title, shall not be avoided; for it were against reason that the lessor should have the remainder again against his own livery.¹⁰

§ 594. Same—III. Remainder must Vest During Continuance of Particular Estate or at the Very Moment of Its Termination. This characteristic, like those which have gone before it, is the necessary consequence of the definition of a remainder. How can the particular estate and the remainder constitute the same estate, unless they subsist and are in esse at one and the same instant of time, so that no other estate shall come between them?

given, until such remainder should come into possession. 2 Washburn, Real Prop. 221.

⁹ 2 Min. Insts. 392; Fearne, Rem. 281; 2 Bl. Com. 168, note (9).

¹⁰ 2 Min. Insts. 392, 393; 2 Bl. Com. 167; 2 Th. Co. Lit. 134.

Any interval whatsoever must destroy that continuity which is indispensable to their identity.¹¹

Indeed, as a general rule (though not invariably), the existence of a possibility of such an interval or gap between the particular estate and the remainder furnishes a sufficient criterion that the remainder is contingent, and not vested. A remainder is void at common law from the time that the existence of such a gap is a certainty; the remainder is contingent so long as there is a possibility (but not a certainty) that there will be such a gap; and it is usually (but not always) a vested remainder as soon as all possibility of such a gap has been eliminated.¹²

Hence, if land be granted to A. for life, remainder to Z. in fee, Z.'s remainder is vested in him at the creation of the particular estate to A. for life. So, if the grant were to A. for life, remainder after C.'s death to Z. in fee, Z.'s remainder, because of the possibility of an interval or gap between A.'s death and the subsequent death of C., is contingent, unless C. dies before A., in which event Z.'s remainder would cease to be contingent, and would become vested in right from the moment of C.'s death, though it would still be only a remainder, and not an estate vested in possession, until A. also dies.

On the other hand, if land is granted to A. for life, and after one year from A.'s death remainder to Z. in fee, Z.'s estate is void as a remainder from the beginning because of the certainty of a gap or interval (of one year) between A.'s estate and that of Z.¹³

So, if the grant be to A. for life, remainder to Z.'s eldest son unborn in fee, the remainder, though good as a contingent remainder so long as A. and Z. are living, becomes void at common law if A. should die before Z. has any son, for it has vested in no one either during the continuance or at the moment of the termination of A.'s particular estate. And even though Z. should afterwards have a son, yet he could not take at common law by way of remainder, for there has been a gap or interval, during which the freehold would have been in abeyance, which is not permissible by the common law, and hence, since the remainder has not vested in right at or before the termination of the particular estate, it can never vest at all at common law, but is gone forever, the estate returning to the grantor or his heirs.¹⁴

¹¹ 2 Min. Insts. 393.

¹² Post, §§ 596, 597.

¹³ 2 Bl. Com. 168; Fearne, Rem. 307.

¹⁴ 2 Min. Insts. 393; 2 Bl. Com. 168; Fearne, Rem. 307, 308; 2 Th. Co. Lit. 128, 137, notes (1), (K).

When a remainder is limited to a person unborn, as to Z.'s oldest son, the strict rule of the common law held it needful that the remainderman should be actually born (and not merely *en ventre sa mere*), at or before the determination of the particular estate. The contrary, however, having been held by the House of Lords, in the case of a devise, in *Reeve v. Long*,¹⁵ against the opinion of all the judges, but upon the advice of Lord Somers, the statute 10 and 11 Wm. III, c. 16, was enacted, declaring that posthumous children should be capable of taking in remainder, by deed also, as if born in the father's lifetime.¹⁶

To guard against the contingency of the particular estate determining before the remainder is ready to vest, it is usual, in England, to interpose trustees to preserve remainders; the idea being that the estate shall vest in the trustees, should the particular estate come prematurely to an end.¹⁷

§ 595. Same—IV. No Remainder can be Limited after a Fee Simple. This results from the very nature of things, as well as from the definition of a remainder. What remnant can there be after a fee simple, which is the whole? And this proposition is true as well of a fee qualified as a fee absolute. If there be a grant of land to A. and his heirs, remainder to B. and his heirs, it is plain that B.'s remainder is nothing. And so, if the grant were to A. and his heirs, as long as Z. has heirs, remainder to B. and his heirs, B.'s remainder is equally void.¹⁸

It is possible, however, even at common law, to limit two concurrent fees, by way of remainder, as substitutes or alternatives, one for the other, the latter to take effect in case the prior one should fail to vest in interest, although, if the first does vest in interest, the subsequent limitation is immediately avoided. Thus, in case of a grant to A. for life, remainder to Z.'s heirs, and in case A. should die, living Z., then to W. and his heirs, the remainder in fee to W. is to take the place of the remainder limited to Z.'s heirs in fee, in the contingency that Z. survives A.; but in the opposite contingency of A.'s surviving Z., the fee-simple remainder to Z.'s heirs becomes vested in interest, and cannot be divested by any contrivance known to the common law, so as to let in a subsequent remainder. Such a limitation as the one above stated is called an alternative remainder, or a remainder on a con-

¹⁵ 3 Lev. 408; 1 Salk. 227.

¹⁶ 2 Min. Insts. 393, 394; 2 Bl. Com. 169, note (13).

¹⁷ 2 Min. Insts. 394; 2 Bl. Com. 171, 172.

¹⁸ 2 Min. Insts. 394; 2 Bl. Com. 164; 2 Th. Co. Lit. 126, note (B); 1 Th. Co. Lit. 505, note (W); *Fearne, Rem.* 12. The same proposition seems to hold of fees conditional. 2 Min. Insts. 394.

tingency in a double aspect, and sometimes a remainder on a double contingency.¹⁹

The impossibility of limiting one fee simple upon another by way of remainder is inherent in the nature of things, and can no more be effected at present than at any past time. But it is now practicable to do what at common law was impossible, namely, to substitute one fee simple for another, not only in the event of the first failing to vest (which was all that could be accomplished at common law), but also, after the first has vested, by putting an end thereto, and transferring the land, on some appointed contingency, to another person, provided only the subsequent limitation shall take effect, if at all, within a life or lives in being, and ten months and twenty-one years thereafter, so as to prevent a perpetuity. This may be done by means of those conditional limitations (a class of executory limitations, hereafter discussed) of which mention has before been made, and which owe their being, it will be remembered, to the statutes of uses and of wills, whereby any estate of freehold may be created without actual livery, and therefore may be determined without re-entry, and thus may be shifted upon a future event from one owner to another.²⁰

§ 596. Nature of Vested Remainders. A vested remainder is defined to be "a remainder limited to a certain person and on a certain event, so as to possess a present capacity to take effect in possession, should the possession become vacant at any moment."²¹

It should be observed that it is not the uncertainty whether the remainder will ever be actually enjoyed in possession that makes a remainder contingent, for to that uncertainty every freehold remainder is and must be liable, since if the remainder be for life merely the remainderman may die before the termination of the particular estate, and if the remainder be in fee the remainderman may die without heirs before the end of the preceding estate.²²

Thus, in case of land conveyed to A. for life, remainder to Z. for life, Z.'s remainder may never take effect in possession, because Z. may die before A.; but being limited to a certain person (Z.) and on a certain event (A.'s death), and being at any moment capable of taking effect in possession, should the possession fall in

¹⁹ Post, § 639; 2 Min. Insts. 395; Fearne, Rem. 373; *Loddington v. Kime*, 1 Ld. Raym. 203; *Doe v. Burnsall*, 6 T. R. 30; *Doe v. Fonnereau*, 2 Dougl. 505, note; *Allison v. Allison*, 101 Va. 556, 44 S. E. 904, 63 L. R. A. 920.

²⁰ 2 Min. Insts. 395; 1 Th. Co. Lit. 505, note (W); Fearne, Rem. 373.

²¹ 2 Min. Insts. 396; Fearne, Rem. 216.

²² 2 Min. Insts. 396.

by the death of A., Z.'s remainder is vested in right. In such case there is no possibility of a gap or interval between A.'s estate and Z.'s remainder; the only uncertainty being whether Z. shall live to enjoy his remainder in possession.²³

Other instances of vested remainders will appear from time to time in the following discussion of remainders which are contingent because they are wanting in one or the other of these three elements of certainty.

§ 597. Nature of Contingent Remainders. A contingent remainder is defined to be "a remainder (1) limited to an uncertain person, or (2) limited upon an uncertain event, or (3) limited to a certain person and on a certain event, but so as not to possess the present capacity to take effect in possession should the possession become vacant at any moment."²⁴

From this definition it will be seen that the remainder is contingent, if there is uncertainty about any one of the following points: (1) The event upon which the remainder is to vest; (2) the person who is to take the remainder; or (3) the present capacity of the remainderman to take the estate in possession, should the present possession at any moment become vacant, or, in other words, the uncertainty as to whether there will or will not be a gap between the termination of the particular estate and the enjoyment of the estate in remainder. If any one of these points be uncertain, the remainder is contingent, and not vested, and a fortiori if there be uncertainty as to more than one of them.

Thus, if land be granted "to D. for life, and at her death to be equally divided among her children, should any survive her," the remainder to the children, is contingent because of the uncertainty of the person to take the remainder, for until the death of D. it cannot be ascertained which of her children will survive her.²⁵

And if land be granted to X. and Z. for life, remainder to the survivor, the remainder is contingent for the same reason as before, namely, the uncertainty of the remainderman, even though in this case there is a present capacity to take the possession, should the possession at any moment become vacant; that is, there is no possibility of a gap or interval.²⁶ So, if there be a grant to A. until he marries Y., upon which event the estate is at once to go over to Z., Z.'s remainder is contingent by reason of the uncertainty of the

²³Ante, § 594.

²⁴2 Min. Insts. 306; Fearn, Rem. 116, 117; 2 Bl. Com. 169, note (10).

²⁵Allison v. Allison, 101 Va. 543, 44 S. E. 904, 63 L. R. A. 920; Howbert v. Cauthorn, 100 Va. 649, 42 S. E. 683.

²⁶Howbert v. Cauthorn, 100 Va. 653, 42 S. E. 683; ante, § 594.

event. Again, upon a conveyance to A. for life, remainder after W.'s death to Z. in fee, Z.'s remainder is still contingent, though limited to a certain person (Z.) and upon a certain event (W.'s death), because it is subject to a condition precedent (A.'s survival of W.), and has not the present capacity to take effect in possession, should the possession become vacant, that is, there is a possibility of an interval or a gap. But upon W.'s death, living A., Z.'s remainder ceases to be contingent and becomes vested; while upon A.'s death, living W., Z.'s remainder becomes altogether void at common law, because of the necessarily resulting interval or gap between A.'s death and that of W. (upon which latter event the remainder is to take effect).²⁷

§ 598. **Several Classes of Contingent Remainders, with Exceptions Thereto.** The several classes of contingent remainders are derivable from the definition and are three in number. Adopting for convenience of discussion a little different order from that of the definition,²⁸ they are: (1) Remainders limited upon an uncertain event; (2) remainders limited to a certain person and on a certain event, but without present and immediate capacity to take effect in possession, should the possession become vacant; and (3) remainders limited to uncertain persons.

To each of the two last named there are certain exceptions of greater or less importance, which will be taken up in due order.

§ 599. **First Class—Contingent Remainders Limited upon an Uncertain Event.** If the event upon which the remainder is to vest is a contingent event, the happening of that event is a condition precedent to the vesting of the remainder, and the rules governing conditions precedent apply with full force.²⁹ The event upon which the remainder thus depends may itself be the contingent termination of the preceding particular estate, or it may be an event not connected with, but collateral to, the termination of that estate.³⁰

The first case may be illustrated by a grant to A. until Z. returns from abroad, and after such return of Z. remainder to W. in fee. Here the particular estate is limited to determine on the return of Z., and only on that determination of it is the remainder to take effect; but that is an event which possibly may never happen, and

²⁷Ante, § 594; 2 Min. Insts. 396; Fearne, Rem. 216; 2 Bl. Com. 169, note (10).

²⁸Ante, § 597.

²⁹Ante, §§. 467, 469; Howbert v. Cauthorn, 100 Va. 649, 42 S. E. 683.

³⁰2 Min. Insts. 397, 398; Fearne, Rem. 5 et seq.; Boraston's Case, 3 Co. 20a.

therefore the remainder, which depends entirely upon the determination by it of the preceding estate, is dubious and contingent.³¹

The second case may be illustrated by a grant or devise of land to A. for life, and if Z. die before X. remainder to W. for life. Here the event of Z.'s dying before X. does not in the least affect the determination of the particular estate, nevertheless it must precede and give effect to W.'s remainder; but such condition precedent may or may not happen, and the remainder for that reason is contingent.³²

It must be particularly observed that the contingency which brings a remainder within this first class must be such as makes it uncertain whether that event will ever happen. Consequently, all cases where the contingency depends on the determination of the particular estate by the mere death of the party (which is an event that must happen), are excluded from the first class.³³

§ 600. **Same—Limitations, if Possible, Construed to be Certain, so as to Make Estates Vested Rather than Contingent.** The student will recall the rule of construction applied to conditions precedent, whereby it is presumed, wherever possible, that a condition is subsequent rather than precedent, in order that thereby the estate may vest the sooner; the law favoring the vesting of estates.³⁴

This rule is often applied in case of remainders which on their face appear to be contingent, thereby creating vested remainders which are liable to be divested by the happening of the contingency (construed as a condition subsequent), instead of construing the contingency as a condition precedent to the vesting of the estate (which construction would render the remainder contingent).³⁵ Thus, upon a conveyance to A. for life, remainder to B. if he live to attain the age of twenty-one, and if he fail to reach such age then to C., B. does not take a remainder contingent upon his first reaching twenty-one, but a vested remainder, liable to be divested by his

³¹ 2 Min. Insts. 397; Fearne, Rem. 5; Boraston's Case, 3 Co. 20a. See, also, illustration of grant "to A. until he marries Y., upon which event the estate is at once to go over to Z.," mentioned ante, § 597.

³² 2 Min. Insts. 398; Fearne, Rem. 6 et seq.; Boraston's Case, 3 Co. 20a.

³³ 2 Min. Insts. 397; Fearne, Rem. 5, note (d).

³⁴ Ante, § 469.

³⁵ 1 Jarman, Wills, 756 et seq.; 4 Kent, Com. 204; Howbert v. Cauthorn, 100 Va. 651, 42 S. E. 683; Doe ex dem. Barnes v. Provoost, 4 Johns. (N. Y.) 61, 4 Am. Dec. 249; Smith's Appeal, 23 Pa. 9; Straus v. Rost, 67 Md. 465, 10 Atl. 74; Rood v. Hovey, 50 Mich. 395, 15 N. W. 525; Chew v. Keller, 100 Mo. 362, 13 S. W. 395; Ellwood v. Plummer, 78 N. C. 392; Clanton v. Estes, 77 Ga. 352, 1 S. E. 163; Bigley v. Watson, 98 Tenn. 353, 39 S. W. 525, 38 L. R. A. 679.

death under twenty-one.³⁶ So, upon a devise to A. for life, remainder to B., C. and D. (the testator's children) with a proviso that the share of any one of such children who shall die before A. shall go to the survivors, the remainder to the children is not dependent upon a condition precedent that they shall survive A. (making the remainder contingent), but is construed to create a vested remainder in ascertained persons, subject to be divested as to the share of either by his death before A.³⁷

So, if a remainder be given after a life estate "to the testator's surviving children" or "to the surviving children of the life tenant" (or of a third person), such a construction will be given to the ambiguous word "surviving" as will not make the children's survival of the life tenant a condition precedent to the vesting of the estate (which would make the remainder contingent). Hence the rule is in favor of construing the word "surviving" as relating, in the absence of a contrary intent, to the testator, and not to the life tenant.³⁸

Upon similar principles, if the estate be given to a life tenant with remainder to ascertained persons, with the proviso that in the case of the death of one of them during the life estate his children shall take his share, the remainder is not contingent, but vested, subject to be divested out of each by his death before that of the life tenant, and vested in his children, if he leaves any.³⁹

§ 601. Same—Words Construed as Importing Time of Enjoyment and Not Contingency. Acting upon the assumption that doubtful and ambiguous words and phrases are to be so construed as to vest the estate if possible, the courts are accustomed to con-

³⁶ 1 Jarman, Wills, 767; *Bromfield v. Crowder*, 4 Bos. & P. (N. R.) 313; *Edwards v. Hammond*, 3 Lev. 132; *Raney v. Heath*, 2 Pat. & H. (Va.) 206; *Inches v. Hill*, 106 Mass. 575; *Roome v. Phillips*, 24 N. Y. 463; *Linton v. Laycock*, 33 Ohio St. 128.

³⁷ 1 Tiffany, Real Prop. § 120; *Harrison v. Foreman*, 5 Ves. Jr. 207; *Howbert v. Cauthorn*, 100 Va. 651, 42 S. E. 683; *Hansford v. Elliott*, 9 Leigh (Va.) 79; *Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Collins v. Collins*, 40 Ohio St. 353.

³⁸ 2 Jarman, Wills, 1433 et seq.; *Howbert v. Cauthorn*, 100 Va. 651, 42 S. E. 683; *Moore v. Lyons*, 25 Wend. (N. Y.) 119; *Embury v. Sheldon*, 68 N. Y. 235; *Grimmer v. Friederich*, 164 Ill. 245, 45 N. E. 498; *Ross v. Drake*, 37 Pa. 373. The modern English rule, followed in some of the states, is to the effect that the survivorship is prima facie to be referred to the termination of the particular estate. 1 Tiffany, Real Prop. § 143; *Olney v. Hull*, 21 Pick. (Mass.) 311; *Slack v. Bird*, 23 N. J. Eq. 238; *Sinton v. Boyd*, 19 Ohio St. 30, 2 Am. Rep. 369; *In re Winter's Estate*, 114 Cal. 186, 45 Pac. 1063.

³⁹ 1 Tiffany, Real Prop. § 120; *Gray, Perpet.* § 108; 4 Kent, Com. 203, note.

strue expressions implying either futurity of time or contingency as meaning the former rather than the latter, and as specifying the time at which the possession shall accrue rather than the conditions upon which the right shall vest. Thus, in case of a limitation to A. for life, and "on," "at," "from," "in the event of," etc., A.'s death to B., the words in quotation marks are construed to refer to the time of taking possession, and not to the vesting of the right, and hence the remainder is vested, despite the fact that by breach of implied condition, or otherwise, A.'s estate may by possibility come to an end before A.'s death.⁴⁰

So it is, also, upon a grant or devise to A. until B. attains the age of twenty-one years, and when B. attains that age then to B. and his heirs. The words "when" and "then" might seem to import a contingency, and to amount to a condition precedent that B. shall attain that age; but in fact they only denote the time when the remainder to B., which is a vested remainder, is to take effect in possession. Thus, in *Boraston's Case*,⁴¹ land was devised for eight years, remainder to the testator's executors until H. B. should attain the age of twenty-one years, and when the said H. B. shall come to his age of twenty-one years, then to him in fee. The remainder in H. B. was regarded as a vested remainder; the words "when" and "then" importing, not contingency, but only the time when H. B.'s remainder should come into possession, so that, although H. B. died before reaching twenty-one, yet the remainder passed to his heirs.

Indeed, it seems that, wherever these adverbs refer to fixed dates or to events which must of necessity happen, they make no contingency, but mark only the time of vesting in possession.⁴²

⁴⁰ 1 Tiffany, Real Prop. § 121; *Doe ex. dem. Poor v. Considine*, 6 Wall. 458, 18 L. Ed. 869; *Lantz v. Massie*, 99 Va. 714, 40 S. E. 50; *Pike v. Stephenson*, 99 Mass. 188; *Corse v. Chapman*, 153 N. Y. 466, 47 N. E. 812; *Ballentine v. Wood*, 42 N. J. Eq. 552, 9 Atl. 582; *Womrath v. McCormick*, 51 Pa. 504; *Bruce v. Bissell*, 119 Ind. 525, 22 N. E. 4, 12 Am. St. Rep. 436; *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395; *McNeely v. McNeely*, 82 N. C. 183.

⁴¹ 3 Co. 21a, 21b. See *Bullock v. Downes*, 9 H. L. Cas. 1; *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754.

⁴² 2 Min. Insts. 416; *Fearne*, Rem. 242 et seq.; *Bromfield v. Crowder*, 1 Bos. & P. (N. R.) 313; *Doe v. Norvell*, 1 M. & S. 334; *Goodright v. Parker*, 1 M. & S. 695; *Doe v. Moore*, 14 East, 601; *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754. When the future limitation is an immediate one—that is, not preceded by any prior particular estate (in which case it is not a remainder, but an executory limitation)—the same doctrine applies in the case of lands, and the words "when," etc., denote time of possession, and not contingency. Post, § 677; 2 Min. Insts. 416, 417; *Doe v. Moore*, supra; *Doe v. Norvell*, supra; *Edwards v. Hammond*, 3 Lev. 132; *Bromfield v. Crowder*, supra.

§ 602. **Second Class—Contingent Remainders Limited to a Certain Person and on a Certain Event, but without Present Capacity to Take Effect in Possession.** In this class of remainders, the only element of uncertainty lies in the doubt whether there is to be an interval or a gap between the termination of the particular estate and the vesting in right of the remainder, or, in other words, whether the remainder will vest in right during the continuance of the particular estate or at the very instant (*eo instanti*) it terminates. The possibility of such a gap makes the remainder contingent; the certainty of it destroys the remainder altogether at common law; and the certainty that there will be no gap in general (though not universally) constitutes the remainder a vested remainder.⁴³

An excellent illustration of the second class of contingent remainders arises upon a grant or devise to A. for life, remainder after W.'s death to Z. in fee, where the person is certain (Z.) and the event is certain (W.'s death), but W.'s death may not happen till after the termination of A.'s particular estate by his death, which would leave an interval between the termination of the particular estate and the vesting of Z.'s remainder, in which event the remainder would fail at common law, because during that interval the freehold would be in abeyance, which is not allowed.⁴⁴ The possibility that there will be such an interval makes Z.'s remainder contingent.⁴⁵

So, a grant to A. for twenty-one years, if he shall so long live, and after his death to Z. in fee, makes Z.'s remainder contingent, since A. may outlive the twenty-one years, whereby the particular estate would terminate before the remainder could commence. And as A.'s estate is not a freehold, Z.'s estate is void altogether as a contingent remainder, because such remainders of freehold must be preceded by estates of freehold,⁴⁶ though it may be upheld, as we shall presently see, as an executory limitation.⁴⁷

This possibility of a gap or interval will always prevent a remainder from being vested, so long as the possibility exists, but it does not constitute an absolute criterion by which to distinguish a contingent from a vested remainder, for there are a few cases

In the case of chattels, the doctrine is applied with qualifications. 2 Min. Insts. 417; 3 Min. Insts. 592; 2 Lom. Ex'rs, 111 et seq.

⁴³Ante, § 594.

⁴⁴Ante, § 136.

⁴⁵2 Min. Insts. 398; Fearne, Rem. 8; Boraston's Case, 3 Co. 20a.

⁴⁶Ante, § 592.

⁴⁷Post, § 676 et seq.; 2 Min. Insts. 398; Fearne, Rem. 8; Boraston's Case, 3 Co. 20a.

of remainders contingent by reason of the uncertainty of the remainderman, where yet there is no possibility of such a gap.

Thus, upon a grant or devise to A. and B. for life, remainder to the survivor, the remainder is contingent during the joint lives of the parties because it is uncertain which will survive, but there exists, notwithstanding, on the part of either the present capacity to take the possession at any moment, should the particular estate terminate by the death of the other; that is, there is no possibility of a gap between the particular estate and the remainder.⁴⁸

And so it is, also, upon a grant to A. for the life of B., remainder to B.'s heirs. The heirs of a living person, as we shall presently see, are unascertained persons, for *nemo est hæres viventis*, and therefore the remainder to B.'s heirs is a contingent remainder, and yet there is no moment when they are not ready to become ascertained and to take the estate upon B.'s death which would terminate A.'s estate.⁴⁹ And, in the absence of the rule in *Shelley's Case*,⁵⁰ the same thing is true of a grant or devise to A. for life, remainder to A.'s heirs. So, also, in case of a devise to "L., for life, with remainder in fee simple to the children of L., living at her death." The remainder is contingent, because limited to uncertain or unascertained persons (it being impossible in advance to say which of the children will be living at L.'s death); but there is, notwithstanding, a present capacity to take the possession, should it at any moment fall vacant by the death of L. Indeed, such is the general rule in all cases where the same event that terminates the particular estate also ascertains the remaindermen hitherto unascertained.⁵¹

In other cases than such as have been adverted to above, the existence or nonexistence of the present capacity to take the possession, should it at any moment become vacant—in other words, the existence or nonexistence of the possibility of a gap—affords an universal criterion by which to distinguish a vested from a contingent remainder. The absence of such present capacity always indicates a contingent remainder; the presence of it, except in such cases as those above mentioned, always indicates that the remainder is vested.

§ 603. **Same—Exception to Second Class of Contingent Remainders.** We have seen in the preceding section that upon a grant or devise "to A. for twenty years, if he shall so long live, and

⁴⁸ 2 Min. Insts. 303.

⁴⁹ *Howbert v. Cauthorn*, 100 Va. 653, 42 S. E. 683; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

⁵⁰ Post, § —.

⁵¹ *Howbert v. Cauthorn*, 100 Va. 653, 42 S. E. 683.

after A.'s death to Z.," Z.'s estate, if he were to take by remainder at all, would be a contingent remainder (though it is void as a contingent remainder of freehold because preceded by a term for years).

But where there is a practical certainty that the event upon which the remainder is to vest will occur during the continuance of the particular estate, the remainder, notwithstanding it falls literally within the second class, is nevertheless ranked among vested estates; e. g., grant to A. for one hundred years, if he shall so long live, remainder after the death of A. to W. in fee. The mere possibility that a life in being may endure for one hundred years to come does not amount to a degree of uncertainty sufficient to constitute a contingent remainder. If the term were short enough to create a common possibility of the life's exceeding the term (as if it were only for twenty-one years), the remainder is contingent, and, if a freehold, would, as already observed, be void, because not preceded by a freehold.⁵²

§ 604. **Third Class—Contingent Remainders Limited to Persons Unascertained or Not in Being.** This class perhaps furnishes more of the ordinary instances of contingent remainders than either of the others. The following are some examples:

If land be granted to A. and B. for life, remainder to the survivor, the remainder is contingent during the joint lives of A. and B. because the survivor is as yet unascertained; and this, notwithstanding the fact that there is no possibility of any interval or gap between the termination of the particular estate and the vesting of the remainder.⁵³

So, a devise or grant to A. for life, remainder to such of A.'s children or issue as are living at his death (or survive him), creates

⁵² 2 Min. Insts. 398; Fearne, Rem. 21 et seq.; Boraston's Case, 3 Co. 20a; *Beverley v. Beverley*, 2 Vern. 131. In *Weale v. Lower*, Pollexfen, 67, the term was ninety-nine years; in *Countess of Darby's Case*, cited in *Littleton's Rep.* 370, and in *Napper v. Sanders*, Hutt. 118, the term was eighty years. In all these cases it was held that the remainder limited thereafter was a vested remainder; the grants being practically equivalent to a life estate followed by a remainder after the death of the particular tenant. But it is apprehended that a much shorter time than any of those above mentioned would come within the same rule if, by the scale of the chances of life, the particular tenant should be practically certain to die before his term is ready to expire. If, for instance, the particular tenant is already an old man, say eighty, when the limitation is made, a much shorter term than eighty years, probably twenty or thirty, would bring the case within the rule of the *Countess of Darby's Case*. 2 Washburn, Real Prop. 241, note.

⁵³ Ante, § 594; 2 Min. Insts. 393; *Howbert v. Cauthorn*, 100 Va. 653, 42 S. E. 683.

a contingent remainder in the children or the issue that outlive A., because it cannot be told who these will be until the death of A., though here too there is no possibility of a gap;⁵⁴ and so does a limitation to A. for life, remainder to such of his children as shall reach the age of twenty-one.⁵⁵

So, upon a conveyance or devise to A. for life, remainder to his unborn son or child, or remainder to his eldest son (he having no son at the time), the remainder, being to a person not in being, is necessarily contingent until a son is born to A., when it immediately becomes vested.⁵⁶ But if, in such case, the remainder were to the eldest son of A. living at A.'s death, the remainder would be contingent until the death of A., for until that time it cannot be definitely known who will answer the description of the remainderman contained in the deed or will, if, indeed, there will be any one to answer it, for the person who now answers the description of A.'s eldest son may die before A., and another or no other take his place.⁵⁷

Perhaps the most frequently recurring instances of this class of contingent remainders are found in the case of remainders limited to the heirs, heirs of the body, issue, descendants, etc., of a living person (it is otherwise if the person be dead), in which case the remaindermen cannot be ascertained till such person's death, for *nemo est hæres viventis*—no one can be the heir of a living person—and his heirs of the body, or issue or descendants (which in a will are equivalent to heirs of the body) are equally unascertainable during his lifetime. Such remainders are always contingent, unless there be an intention to use the words referred to in some other than their technical sense.⁵⁸ It may be also observed in this connection as a general rule of construction that, where there is an ultimate limitation over to the heirs of the testator or of another person upon the failure of intervening contingent remainders, the word "heirs" is used *prima facie* as embracing those persons who correspond to that description at the time of the testator's death,

⁵⁴ *Howbert v. Cauthorn*, 100 Va. 649, 42 S. E. 683; *Smith v. Rice*, 130 Mass. 441; *Paget v. Melcher*, 156 N. Y. 399, 51 N. E. 24; *Chapin v. Crow*, 147 Ill. 219, 35 N. E. 536, 37 Am. St. Rep. 213; *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295; *Small v. Small*, 90 Md. 550, 45 Atl. 190; *Paul v. Frierson*, 21 Fla. 529; *Jackson v. Everett* (Tenn. Sup.) 58 S. W. 340.

⁵⁵ 1 *Jarman*, Wills, 775; *Festing v. Allen*, 12 M. & W. 279; *Risher v. Adams*, 9 Rich. Eq. (S. C.) 247.

⁵⁶ 2 Min. Insts. 399; 1 *Tiffany*, Real Prop. § 120.

⁵⁷ 1 *Tiffany*, Real Prop. § 120; *Williams*, Real Prop. 268.

⁵⁸ 2 Min. Insts. 399; *Fearne*, Rem. 9; *Boraston's Case*, 3 Co. 20a; *Suburban Co. v. Turner*, 105 Va. 456, 54 S. E. 29; *Richardson v. Wheatland*, 7 Metc. (Mass.) 169; *Hall v. La France Engine Co.*, 158 N. Y. 570, 53 N. E. 513.

and not at the time of the termination of the particular estate, thus making the ultimate remainder vest the sooner.⁵⁹ Thus, in *Allison v. Allison*,⁶⁰ the testamentary provision was to the testator's "daughter for life, and at her death to be equally divided among her children should any survive her—if she should die without issue, or if her surviving child or children should die before becoming of age, then the property bequeathed for the benefit of my daughter is to be divided among my heirs at law according to the laws of the state of Virginia." It was held after grave consideration that the last clause referred to those persons who answered the description of the testator's heirs at the time of his death, not at the time of his daughter's.

§ 605. Exceptions to Third Class of Contingent Remainders—Enumeration. To the third class of contingent remainders there are four prominent exceptions, whereby limitations, which, upon their face, appear to be contingent remainders, because of the uncertainty of the party to take, are construed to have a different effect.

These exceptions are as follows: (1) Where the remainder is to a class of persons, some of whom are in being and some not; (2) where the remainder is to the heirs of the grantor or testator; (3) where there are qualifying words showing an intent to use the word "heirs," etc., as designating particular individuals; and (4) the rule in *Shelley's Case*.

§ 606. First Exception—Remainder to a Class of Persons. Upon a devise or conveyance to A. for life, remainder to A.'s children, or remainder to the children of B. (or in the place of children, read nephews, brothers, brothers and sisters, or remainder to B.'s issue, descendants, etc., or any designated class of persons), such a remainder would seem at first glance to be contingent by reason of the uncertainty as to what persons will constitute the class mentioned at the expiration of the particular estate. And in fact it is contingent, so long as there are none of the class in existence, for the remainder is then to persons not in being.⁶¹

But it is established that all such children, etc., living at the testator's death or at the time of the conveyance take vested remainders, subject to open up and let in others who are subsequently born before the termination of the particular estate, the shares of

⁵⁹ *Allison v. Allison*, 101 Va. 544, et seq., 44 S. E. 904, 63 L. R. A. 920; *Buzbys' Appeal*, 61 Pa. 111; *Abbott v. Bradstreet*, 3 Allen (Mass.) 587; *Rotch v. Rotch*, 173 Mass. 125, 53 N. E. 268; *Bullock v. Downes*, 9 H. L. Cas. 1; *Gorbell v. Davison*, 18 Beav. 556; *Ware v. Roland*, 15 Sim. 587.

⁶⁰ 101 Va. 537, 544, et seq., 44 S. E. 904, 63 L. R. A. 920.

⁶¹ *Ante*, § 604; 1 *Tiffany*, Real Prop. § 122.

the others being in such case proportionately diminished though until one of such class comes into being the remainder is contingent.⁶² But at common law no member of the class not coming into existence before the termination of the particular estate could take, as that would be to permit a gap between the preceding estate and the remainder, and would violate the common-law rule that the remainder must take effect during the continuance of the particular estate or at the very moment of its termination.⁶³

§ 607. **Second Exception—Remainder to Grantor's or Testator's Heirs.** While, as has been shown, the general rule is that a limitation after a particular estate to the heirs of a living person is a contingent remainder,⁶⁴ it is a rule of the common law, which is always eager to discriminate carefully between the acquisition of land by descent and by purchase, respectively,⁶⁵ that if land is limited by way of remainder (so called) to the heirs of the grantor (or testator), this does not create a contingent remainder in the grantor's or testator's heirs, but is simply a reservation by the grantor or testator of the reversion after the particular estate granted. It is the same as if no mention were made of the heirs of the grantor or testator, since in such case the law would create the reversion in the grantor or in the testator's heirs, or at least a possibility of reverter in cases where a fee qualified or the fee simple upon condition has been granted or devised. In other words, what the grantor or testator calls a remainder is really not such, but is the reversion or quasi reversion after the estates granted or devised, and is governed by the principles controlling these latter interests, where there is any difference, rather than by those regulating contingent remainders. The land does not devolve upon the heirs of the grantor or testator as purchasers (as it would do if they were remaindermen), but devolves upon them, if at all, by descent.⁶⁶

⁶² 2 Min. Insts. 462; Fearne, Rem. 312; 1 Tiffany, Real Prop. § 122; Doe v. Perryn, 3 T. R. 484, 494; Right v. Creber, 5 B. & Cr. 866; Doe ex dem. Poor v. Considine, 6 Wall. 458, 18 L. Ed. 869; Cooper v. Hepburn, 15 Grat. (Va.) 558; Corse v. Chapman, 153 N. Y. 466, 47 N. E. 812; Doe ex dem. Barnes v. Provoost, 4 Johns. (N. Y.) 63 et seq., 4 Am. Dec. 249; Hannan v. Osborn, 4 Paige Ch. (N. Y.) 341; Dorr v. Lovering, 147 Mass. 530, 18 N. E. 412; Hills v. Simonds, 125 Mass. 536; Anthracite Sav. Bank v. Lees, 176 Pa. 402, 35 Atl. 197; Irvin v. Clark, 98 N. C. 437, 4 S. E. 30; Gourdin v. Deas, 27 S. C. 479, 4 S. E. 64; Coots v. Yewell, 95 Ky. 367, 25 S. W. 597, 26 S. W. 179; Ross v. Adams, 28 N. J. Law, 160; Amos v. Amos, 117 Ind. 19, 19 N. E. 539; Waddell v. Waddell, 99 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575.

⁶³ Ante, § 594.

⁶⁴ Ante, § 605.

⁶⁵ Post, § 786.

⁶⁶ Post, § 786 et seq.; 2 Min. Insts. 329, 400; Fearne, Rem. 50, 51; 2 Th. Co. Lit. 142, 128, note (E); Chadleigh's Case, 1 Co. 130a; Bingham's

§ 608. **Third Exception—Remainder to Heirs of a Living Person, but with Qualifying Words Designating the Persons Intended.** The reason why a remainder limited to the heirs, heirs of the body, issue or descendants (if used in the sense of heirs of the body), etc., of a living person, is contingent, is because it is impossible to say in advance of one's death who will be his heirs in the technical sense, for *nemo est hæres viventis*. But the reason for the rule, as well as the rule itself, ceases to apply, if we suppose other words added to the word "heirs," etc., which show that the grantor or testator did not have in mind the technical meaning of the word "heirs," etc., but employed it to describe and designate certain persons in being. In such case, the remainder, instead of being limited to persons unascertained, or perhaps not in being (and therefore a contingent remainder), is limited to certain designated persons in being, and is therefore a vested remainder.⁶⁷

Thus, upon a grant or devise to A. for life, remainder to the now living heirs of W., the words "now living" so qualify the word "heirs" as to show that the latter term was not intended to be used in the technical sense of an indefinite succession of W.'s heirs, nor even of those living at his death whom the law would designate as his immediate successors, but was intended to mean only those living persons who would be W.'s heirs if he were to die at once; that is, his heirs apparent or presumptive at the time of the grant or devise. These are ascertained persons, and hence the remainder to them is vested.⁶⁸

§ 609. **Fourth Exception—Rule in Shelley's Case—Discussion Outlined.** A notable exception to the general rule that a remainder limited to the heirs, etc., of a living person creates a contingent remainder in such heirs is to be found where the heirs, etc., to whom such remainder is limited are the heirs, etc. (used in the technical sense of an indefinite succession of heirs, etc.), of the tenant of the preceding estate (being an estate of freehold), as where land is granted to A. for his own life or for the life of another (or during coverture, or any other estate of freehold), with remainder to the heirs or heirs of the body of A.

In such case, by a long-recognized and well-established rule of the common law, the so-called remainder to A.'s heirs or heirs of the body is not a remainder at all, but merely serves as words of limita-

Case, 2 Co. 91b; Counden v. Clerke, Hob. 30a; Godolphin v. Abingdon, 2 Atk. 57.

⁶⁷ 2 Min. Insts. 400.

⁶⁸ 2 Min. Insts. 400, 402, 410; Fearne, Rem. 290; 2 Th. Co. Lit. 128, note (E).

tion to mark out and define the estate of A., the ancestor, just as though the estate were limited "to A. and his heirs" or "to A. and the heirs of his body." The words "heirs," etc., are words of limitation, defining A.'s estate as an estate of inheritance, and not words of purchase, creating a distinct estate in A.'s heirs or heirs of the body, as purchasers or remaindermen.⁶⁹

This is the famous rule of law known for centuries as "the rule in Shelley's Case," first clearly propounded in the Year-Book, 18 Edw. II, 85, and acknowledged in argument and actually decided to be an important canon of the law of real property in Shelley's Case.⁷⁰

Let us note in connection with this rule: (1) Its precise terms; (2) the circumstances necessary for its operation; (3) the reasons and policy of the rule; (4) its application.

§ 610. I. Precise Terms of Rule in Shelley's Case. Whenever an ancestor, by any will, gift or conveyance, takes an estate of freehold in lands or tenements, and in the same will, gift or conveyance an estate is afterwards limited by way of remainder, either mediately or immediately, to his heirs or the heirs of his body, the words "heirs" or "heirs of the body" are words of limitation, carrying the inheritance to the ancestor, and not words of purchase, creating a contingent remainder in the heirs.⁷¹

§ 611. II. Circumstances Necessary to Operation of Rule in Shelley's Case—Enumeration. The following circumstances must concur in order that the rule in Shelley's Case may be applicable: (1) The limitation to the heirs, etc., must be such as would ordinarily create a valid contingent remainder in the heirs at common law.

⁶⁹ 2 Min. Insts. 400; 2 Th. Co. Lit. 128, note (E); Fearne, Rem. 28, 29, note (1).

⁷⁰ 1 Co. 104a, Thomas' Ed.; Challis, Real Prop. c. 13. See 2 Min. Insts. 400; Fearne, Rem. 28 et seq., note (1); 2 Th. Co. Lit. 128, note (E). Mr. Challis' theory of the rule is different from that outlined in the text. In brief, his theory is that upon a grant to A. for life, remainder to A.'s heirs, the rule in Shelley's Case operates to give the remainder to A. and his heirs, thus giving A. both the life estate and the inheritance by way of remainder, the latter merging the former, and thus giving A. the immediate inheritance. There is but little difference in practical result between the two views. See Challis, Real Prop. 124; 1 Hayes, Conveyancing, 542 et seq.; 1 Tiffany, Real Prop. § 130. See, also, Van Grutten v. Foxwell, [1897] App. Cas. 658, 669.

The rule in Shelley's Case has in some states been wholly abolished. In others it has been abolished as to wills only. See 2 Washburn, Real Prop. (6th Ed.) § 1616.

⁷¹ 2 Min. Insts. 400, 401; 2 Th. Co. Lit. 143; Fearne, Rem. 28, note (1), 29; Shelley's Case, 1 Co. 106b, note (I, 5), Thomas' Ed.

(2) The limitation must be to the heirs, etc., of the tenant of the preceding estate, and of no other person. (3) The particular estate and that to the heirs, etc., must be of the same quality; that is, both legal or both equitable. (4) The words "heirs," etc., must be used in the technical sense as importing an indefinite succession of heirs, etc.

§ 612. **Same—1. Limitation to Heirs Such as Would Ordinarily Create Valid Contingent Remainder.** In order that the rule in Shelley's Case may operate, it is essential that the limitation to the heirs, etc., of the first taker be of such a nature that, but for the rule, it would create a contingent remainder in the heirs, etc., which would be valid according to the general principles of the common law.

Thus, since the limitation to the heirs creates a freehold estate which, if it were a contingent remainder, would require a preceding estate of freehold,⁷² it follows that the rule in Shelley's Case can operate only where the preceding estate in the ancestor is an estate of freehold.⁷³ But it is immaterial whether the ancestor takes the preceding freehold by express limitation, by resulting use, or by implication of law; and the possibility that it may terminate in the ancestor's lifetime does not prevent the subsequent limitation to his heirs from attaching in himself as a vested interest. The rule operates, also, though the freehold be limited to two or more persons jointly or as tenants in common; but in that case there are various distinctions as to the effect of the subsequent limitation to the heirs, some of which will be adverted to under another head.⁷⁴

For the same reason it is essential that the ancestor take his preceding estate of freehold by, or in consequence of, the same assurance which contains the limitation to the heirs, etc.; for the definition of a remainder requires that the remainder should be created by the same conveyance as the particular estate, since they are both parts of an entire grant.⁷⁵ But this requirement is satisfied, if the limitations to the ancestor and to the heirs be parts of the same transaction, though contained in several instruments, as a deed or will creating a power, and an appointment exercising the power, or a will and a codicil supplemental thereto.⁷⁶

⁷² Ante, § 592.

⁷³ 2 Min. Insts. 411.

⁷⁴ 2 Min. Insts. 401; 2 Washburn, Real Prop. 270; Fearn, Rem. 33, 35, et seq.; 2 Th. Co. Lit. 145, note (P) 147, note (P); 1 Preston, Est. 309, 313, 320; Pybus v. Mitford, 1 Vent. 322; Hayes v. Foorde, 2 Wise, 698; Shelley's Case, 1 Co. 106b, note (I, 5), Thomas' Ed.

⁷⁵ Ante, § 593.

⁷⁶ 2 Min. Insts. 401; 1 Preston, Est. 309; Shelley's Case, 1 Co. 106b, note (I, 5), Thomas' Ed.; Venables v. Morris, 7 T. R. 342, 347.

And so, if the subsequent limitation to the heirs is not in the nature of a remainder, but of an executory limitation, the rule in Shelley's Case does not apply.⁷⁷

§ 613. Same—2. Limitation must be to Heirs, etc., of Preceding Tenant, and of None Other. The rule in Shelley's Case does not operate if the estate be limited by way of remainder to the heirs of another than the tenant of the preceding freehold estate; the limitation in such case taking effect as an ordinary contingent remainder.

Thus, upon a grant or devise to A. for life, remainder to the heirs (or heirs of the body, etc.) of B., the heirs of B. take a contingent remainder, and there is no room for the operation of the rule in Shelley's Case. And even if B. should afterwards purchase A.'s life estate, the rule does not apply, though B. has the freehold and his heirs the remainder; but the estate to B.'s heirs remains a contingent remainder, for the rule in Shelley's Case demands for its operation that the ancestor's freehold and the remainder to his heirs should be created by the same assurance.⁷⁸

But if an estate is limited by deed or will to one for life, and afterwards there is a limitation in his lifetime to his heirs under the exercise of a power of appointment contained in the same deed or will, the appointment to the heirs is looked upon as taking effect under the original deed or will, and therefore the rule operates to give the inheritance to the ancestor.⁷⁹

This requirement for the rule in Shelley's Case, however, goes further and prohibits a joint limitation to the heirs of the ancestor and of another. Thus, upon a grant to A. for life, remainder to the heirs of A. and B., the rule in Shelley's Case does not operate to vest an inheritance in A.; but the limitation constitutes simply an ordinary contingent remainder jointly to the heirs of A. and the heirs of B., for although every person may be supposed so far to carry his own heirs in himself during his lifetime as that a limitation to them may vest in himself, yet no person, as is quaintly said, can be supposed to include in himself his own heirs and also those of somebody else.⁸⁰

This qualification applies even though the person other than the particular tenant, to whose heirs jointly with the latter's the limitation is made, is the husband or wife of the particular tenant.

⁷⁷ 2 Min. Insts. 411; Fearne, Rem. 276.

⁷⁸ Ante, § 612; 2 Min. Insts. 409, 410; Fearne, Rem. 71, 72.

⁷⁹ Ante, § 612; 2 Min. Insts. 407, 410; Fearne, Rem. 74; Venables v. Morris, 7 T. R. 342, 347.

⁸⁰ 2 Min. Insts. 409; Fearne, Rem. 38, 312; 2 Th. Co. Lit. 144, note (P); Denn v. Gillot, 2 T. R. 435.

Thus, though the estate be limited to A. for life, remainder to the heirs of the bodies of A. and his wife, this would not vest a fee tail in A. by the rule in Shelley's Case, but would create a contingent remainder in the heirs of the body of both A. and his wife, as purchasers, whereas if the life estate had been given to A. and his wife, remainder to the heirs of their bodies, the husband and wife would, by the rule in Shelley's Case, have taken a joint estate tail, and the heirs of their bodies could only have taken by descent.⁸¹

§ 614. **Same—3. Both Estates must be of the Same Quality, That is, Both Legal or Both Equitable.** If there were an union of the limitations, that to the ancestor and that to the heirs, when one is legal and the other equitable, the confusion and embarrassment in determining the quality and properties of the resulting estate would be extreme. Would it be a legal estate? Surely not, since one part of the limitation is equitable. Would it be an equitable estate? That would be inconsistent with the fact that a part of the limitation is legal. The two limitations, therefore, cannot coalesce, and that to the heirs, or heirs of the body, is a contingent remainder.⁸²

§ 615. **Same—4. Words "Heirs," etc., must be Used in Technical Sense, as Importing Indefinite Succession.** It is essential to the operation of the rule in Shelley's Case that the "heirs," "heirs of the body," etc., to whom the future limitation is made shall mean, not particular designated living persons, nor even one or two or more future generations of successors, but that indefinite line of successors through the ages, which is necessary in law in order to make the words words of limitation, and which is meant when we say that we are the heirs of the body or descendants of Adam, the idea of which, in Biblical language, is conveyed by such phrases as "the children of Israel," "the seed of Abraham," etc.⁸³

Even though the remainder be limited to every possible person who could be the heir of the particular tenant at a certain time, unless it also appear that it is the intention to limit it in indefinite succession, so that it will embrace every possible heir for all time, the rule in Shelley's Case is not applicable. Thus, a grant or devise to A. for life, remainder to the heirs of A.'s body living at his death or born within ten months thereafter, though embracing every pos-

⁸¹ 2 Washburn, Real Prop. 270.

⁸² 2 Min. Insts. 401; Fearne, Rem. 52, 58, 59, note (d); Shelley's Case, 1 Co. 106b, note (I, 5), Thomas' Ed.

⁸³ 2 Min. Insts. 406; 2 Jarman, Wills, 271; Jesson v. Wright, 2 Bligh, P. C. 1; Moore v. Brooks, 12 Grat. (Va.) 135, 143, et seq.; Taylor v. Cleary, 29 Grat. (Va.) 448.

sible immediate heir of A.'s body (of the first generation; that is, child), does not embrace nor describe A.'s descendants of the fifth, tenth or hundredth generation. In such a limitation, therefore, the term "heir of the body" is not employed in the technical sense of an indefinite succession of heirs of the body, but in the quite different sense of descendants of the first, or at most of the second or third, generation, and hence would create merely an ordinary contingent remainder in that particular group of descendants.⁸⁴

On the other hand, if it appears that the words "heirs," etc., were used to designate certain particular individuals only, as if the limitation were to the heirs now living, the rule in Shelley's Case would not be applicable; but the persons who, at the time of the limitation, were the ancestor's heirs apparent, or presumptive, would take a vested remainder.⁸⁵

And so, upon a grant to A. for life, remainder to the heirs of A. who shall then have attained the age of twenty-one years; or remainder to the sons of A. and their heirs; or remainder to the heir of A. and the heirs male of the body of such heir; or remainder to such persons as shall, at the life tenant's death, answer the description of heirs at law of the life tenant—in all these cases, the subsequent words of limitation are, in general, words of purchase, creating a remainder in the party to whom the limitation is made, which will be vested if the person is ascertained, and contingent if he is not ascertained.⁸⁶

Let it be remembered, however, while such is in general the construction of the foregoing limitation, that where a clear manifestation of an intent that the persons who are to take the so-called remainder are the heirs or heirs of the body of the first taker, in indefinite succession, the rule in Shelley's Case is applicable, notwithstanding the superadded words of modification.⁸⁷

It may be added in conclusion that if the limitation of the freehold to the ancestor is followed by a limitation to his sons, children, etc., these words (in a deed, and generally in a will) do not betoken that indefinite succession which the rule in Shelley's Case supposes, and which the words "heirs" or "heirs of the body" technically import; so that they are words of purchase and not of limitation, vest-

⁸⁴ See *Warner v. Mason*, 5 Munf. (Va.) 242.

⁸⁵ 2 Min. Insts. 402; *Fearne*, Rem. 210, note (a). See *Taylor v. Cleary*, 29 Grat. (Va.) 448.

⁸⁶ 2 Min. Insts. 410; *Fearne*, Rem. 150 et seq., 178, 210; 2 Th. Co. Lit. 145, note (P); 4 Kent, Com. 220; *Archer's Case*, 1 Co. 66b; *Lewis Bowles' Case*, 11 Co. 30a; *Doe v. Laming*, 2 Burr. 1100.

⁸⁷ 2 Min. Insts. 410; *Jesson v. Wright*, 2 Bligh, P. C. 1.

ing a remainder in the sons, etc., and not an inheritance in the ancestor.⁸⁸

§ 616. III. Policy of the Rule in Shelley's Case. The rule is not a means to discover the intention of the grantor or testator; but, supposing the intention ascertained, the rule controls it so far as it is repugnant to the policy of the law, giving effect to the general and legal, rather than to the more particular and proscribed, intent. The party making such a limitation has in his mind two purposes, which are legally in conflict. One is to give the ancestor only a life estate; the other, to limit the land to his heirs collectively and in indefinite succession. These two intents cannot stand together, without more or less of general mischief to the public welfare; and the rule prevails simply to subordinate the particular, and apparently less important, design of limiting the ancestor's interest to a life estate, to the more comprehensive, and probably the preferred, purpose of transmitting the inheritance in the manner indicated.⁸⁹

§ 617. IV. Reasons for the Rule in Shelley's Case—Enumeration. The reasons for the rule may be stated as follows, namely: (1) To prevent the lord from being deprived of the feudal incidents of wardship and marriage; (2) to prevent the inheritance from being in abeyance during the ancestor's life; (3) to prevent the nonalienability of the inheritance during the ancestor's lifetime; and (4) to preserve the marked distinctions between descent and purchase.

§ 618. Same—1. To Prevent Loss of Wardship and Marriage. By the feudal law the incidents of wardship and marriage existed only when the heir claimed by descent, so that if he took by way of remainder, as purchaser, they would have been lost to the lord.

And although this be a purely feudal reason, yet the rule to which a feudal reason gives birth does not cease because the original reason has ceased, as is exemplified in very many doctrines of the law, e. g., the right of distress for rent, apportionment of common, etc.⁹⁰

§ 619. Same—2. To Prevent Inheritance from Being in Abeyance. The abeyance of the freehold was never permitted at all by the common law, as has been shown;⁹¹ and the abeyance of the inheritance was always discouraged, the courts always leaning in

⁸⁸Ante, § 606; 2 Min. Insts. 84, 410, 411; Fearne, Rem. 150 et seq.; 2 Th. Co. Lit. 145, note (P).

⁸⁹2 Min. Insts. 402; 2 Th. Co. Lit. 143, note (P), 151, note (P); Fearne, Rem. 153 et seq.; Hargrave, Law Tracts, 551; 4 Kent, Com. 217.

⁹⁰Ante, §§ 10, 11; 2 Min. Insts. 72, 402, 403; 1 Th. Co. Lit. 151, note (1); 2 Th. Co. Lit. 143, note (P).

⁹¹Ante, § 136.

favor of any construction that would prevent this result and lead to the prompt vesting of the estate,⁹² because there was otherwise created a suspension of various operations of law, particularly of the remedies for the recovery of lands by real actions.⁹³

§ 620. Same—3. To Prevent Nonalienability of Inheritance during Ancestor's Life. If the limitation to the heirs were a contingent remainder to persons not ascertainable till the life tenant's death, the remainder must, of course, remain inalienable during the ancestor's lifetime. *Nemo est hæres viventis*.⁹⁴

This third reason and the second are much insisted on by Mr. Justice Blackstone, in his famous argument in *Perrin v. Blake*,⁹⁵ in which he ascribes the rule, in part, to a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner than if the ancestor were regarded as only tenant for life, and the heir as the purchaser of the inheritance. He likens the case to the ordinary limitation to a man and his heirs, which is universally recognized, without dispute, as vesting an inheritance in the grantee himself, who, in the quaint language of Lord Coke, "during his life beareth in his body (in judgment of law) all his heirs," who are so totally in him that, in the case supposed, he may give the lands to whom he will. And with a manliness which does him honor, considering the fashion which just then prevailed, of decrying the rule, the learned commentator declares that, however narrow and illiberal the original establishment of the rule, or the adhering to it in later times, may have been represented in argument, he was of opinion that those constructions of law which tend to facilitate the sale and circulation of property in a free and commercial country, and which make it more liable to the debts of the visible owner, who derives a great credit from that ownership, are founded upon principles of public policy altogether as open and as enlarged as those which favor the accumulation of estates in private families, by fettering inheritances till the full age of posterity as yet unborn, and which may not be born for half a century.⁹⁶

§ 621. Same—4. To Preserve the Marked Distinctions between Titles by Descent and by Purchase. If the heir takes by purchase, as a remainderman, he is not liable, by virtue of his ownership of the lands, for the ancestor's debts; but if the inheritance is vested

⁹² Ante, § 600.

⁹³ 2 Min. Insts. 403; 2 Th. Co. Lit. 143, note (P); Hargrave, Law Tracts, 499.

⁹⁴ 2 Min. Insts. 403; 2 Th. Co. Lit. 143, note (P).

⁹⁵ 4 Burr. 2579; Hargrave, Law Tracts, 499, 500.

⁹⁶ 2 Min. Insts. 403, 404; Hargrave, Law Tracts, 500.

in the ancestor, the heir succeeding thereto by descent is, to the extent of its value, answerable at common law for the ancestor's record debts, and the specialty debts binding the heirs, and in this country for all the debts.

This fourth reason is particularly insisted on by Mr. Hargrave in his lucid exposition of the rule.⁹⁷

§ 622. **V. Instances of Application of Rule in Shelley's Case—1. Where Ancestor's Life Estate Terminates in His Lifetime.** Thus, upon a grant to A. and B. during their joint lives, remainder to Z. for life, remainder to A.'s heirs, if B. and Z. die, living A., it terminates the freehold estate and the subsequent remainder in the lifetime of the ancestor A., and yet the rule applies so as to vest the inheritance in A. At least to this conclusion Mr. Fearne comes, with irresistible force of reason and authority, against the opinion of Mr. Sergeant Rolle.⁹⁸

§ 623. **Same—2. Joint Limitation of Freehold to Several, Followed by Joint Limitation to Heirs of Same Parties.** Thus, upon a grant or devise to A. and B. for their joint lives, remainder to C. for life, remainder to the heirs of A. and B., both limitations being of the same quality, that is, both joint, the fee vests in them jointly. So it does, also, where the limitation of the freehold is to husband and wife, remainder to their heirs.⁹⁹

§ 624. **Same—3. Joint Limitation of Freehold to Several, Followed by Limitation to the Heirs of One of Them.** Thus upon a grant or devise to A. and B. for their lives, and after their deaths, to the heirs of B., or to the heirs of the survivor, the inheritance is said to be executed *sub modo*; that is, to some purposes, but not to all. For though the inheritance is so far blended with the possession as not to be grantable by way of remainder, away from or without the freehold, yet it is not so executed in possession as to sever the jointure.¹

§ 625. **Same—4. Limitation of Freehold Successively to Two or More, with Remainder to Their Heirs.** For example, a grant or devise to A. for life, remainder to B. for life, remainder to the heirs of A. and B. The ultimate limitation is not executed in possession

⁹⁷ 2 Min. Insts. 404; Hargrave, Law Tracts, 489, 551; 2 Th. Co. Lit. 151, note (P).

⁹⁸ 2 Min. Insts. 404; Fearne, Rem. 30, 33; 2 Th. Co. Lit. 143, note (P); 2 Rolle, Abr. 418.

⁹⁹ 2 Min. Insts. 405; 1 Th. Co. Lit. 743; Fearne, Rem. 35, 36.

¹ 2 Min. Insts. 405; Fearne, Rem. 36; 1 Th. Co. Lit. 745 et seq.; Wiscot's Case, 2 Co. 61a, note (G), Thomas' Ed.

jointly, but the rule applies, and A. and B. take several inheritances, and are tenants in common thereof.²

It may not be amiss to add, that in England, if A. and B. were a man and a woman who could intermarry legally, and the limitation were to the heirs of their bodies, they would take a joint inheritance in tail.³

§ 626. **Same—5. Intervention of Remainder between Ancestor's Estate and Limitation to the Heirs.** For example, upon a devise or grant to A. for life, remainder to Z. for life, if he should survive W., remainder to A.'s heirs, the limitation to the heirs of A. unites with A.'s freehold only sub modo, opening, if necessary, to let in the intervening estate.⁴

And so it is, also, if the intervening estate be vested, as in case of a limitation to A. for life, remainder to B. for life, remainder to A.'s heirs.⁵

§ 627. **Same—6. Remainder to Heirs Contingent upon Some Uncertain Event.** If the remainder to the heirs, etc., is in form contingent upon some event, as in case of a limitation to A. for life, and, if A. survive B., remainder to A.'s heirs, etc., the rule operates, and A. takes an inheritance, but contingent upon his surviving B.⁶

§ 628. **Same—7. Subsequent Limitation to the Heir (in the Singular) without Words of Limitation Superadded.** Thus, upon a grant or devise to A. for life, remainder to A.'s "heir," notwithstanding the word is in the singular number, yet without superadded words of limitation such as existed in Archer's Case,⁷ it is nomen collectivum (importing indefinite succession), so that the rule applies, and the ancestor takes an estate in fee simple.⁸

In Archer's Case,⁹ the limitation was "to R. A. for life, and afterwards to the next heir male of R. A., and to the heir male of the body of such next heir male." These words of superadded limitation were held to prevent the application of the rule, and to vest in R. A.'s heir male a contingent remainder in tail male.

² 2 Min. Insts. 405; 2 Th. Co. Lit. 743; Fearne, Rem. 36; Stephens v. Brittridge, 1 Lev. 36.

³ 2 Min. Insts. 405; Fearne, Rem. 36; 1 Th. Co. Lit. 743.

⁴ 2 Min. Insts. 405; Fearne, Rem. 37; Lewis Bowles' Case, 11 Co. 80a.

⁵ Fearne, Rem. 29; Colson v. Colson, 2 Atk. 246.

⁶ Fearne, Rem. 34; 1 Preston, Est. 319, 333.

⁷ Archers' Case, 1 Co. 66b.

⁸ 2 Min. Insts. 406; Fearne, Rem. 178; Archer's Case, 1 Co. 66b; Burley's Case, 1 Vent. 230; White v. Collins, Com. 301; Richards v. Bergavenny, 2 Vern. 325, note (1); Dubber v. Trollope, 2 Ambl. 453, note (2); Blackburn v. Stables, 2 Ves. & B. 370, 371; Stokes v. Van Wyck, 83 Va. 731, 3 S. E. 387.

⁹ 1 Co. 66b.

§ 629. Same—8. Limitation to Heirs, etc., in Indefinite Succession, but with Inconsistent Words of Modification Superadded. If the intent appear to be that the persons who are to take the so-called remainder shall be the heirs, or heirs of the body, etc., of the first taker, in indefinite succession, the rule is applicable, notwithstanding words of modification are superadded which are inconsistent with the estate of inheritance in the ancestor which the rule gives. Thus, in the leading case of *Jesson v. Wright*,¹⁰ the devise was in substance to William for life, and then to the heirs of his body, share and share alike, as tenants in common; and it was determined, after great consideration, by the House of Lords, that William took an estate tail, out of regard to the general intent.

§ 630. Same—9. Where Ancestor Takes Freehold Estate by Implication. For example, in case of a devise to Z. for life after the death of A. (devisor's heir), remainder to W. for life, remainder to A.'s heirs, A. takes an estate for life by implication, for since Z. is not to have the land until after A.'s death, and A. is the heir of the devisor, there would be no one to whom it could go unless A. took it; and this estate for life by implication unites with the limitation to A.'s heirs as readily as if it had been granted in express terms.¹¹

So, where A. covenants to stand seised to the use of the heirs male of his body, he excepts by implication an estate for life, which, united with the estate limited to the heirs male of his body, gives him at common law an estate tail male.¹²

§ 631. Same—10. Limitation to Heirs, etc., Created by Different Instrument, but under Power of Appointment Contained in Same Instrument. For example, a limitation to the use of A. for life, and after his decease to such uses as Z. shall appoint, who afterwards, in A.'s lifetime, appoints the use to the heir of A. It being a well-understood principle that an appointee claims always under the instrument which created the power, it follows that the heirs of A. stand in the same position as if the instrument limiting the use to A. had afterwards itself made the limitation to his heirs.¹³

§ 632. Same—11. Application of Rule in Shelley's Case to Personal Property. The rule in Shelley's Case, or more accurately an analogous rule, is applied to limitations of terms for years and of personal chattels nearly as in case of freeholds in lands. Thus, if

¹⁰ 2 Bligh, P. C. 1.

¹¹ Ante, § 184; 2 Min. Insts. 407; Fearne, Rem. 40 et seq.

¹² 2 Washburn, Real Prop. 270.

¹³ 2 Min. Insts. 407; Fearne, Rem. 74; *Venables v. Morris*, 7 T. R. 342, 347.

a term for one hundred years, or a personal chattel, be given to A. for life, and afterwards to A.'s heirs, these latter words are construed generally to be words of limitation, and the whole property vests in A. The only diversity seems to be that a less circumstance is allowed, in case of personalty, to show the intention that the heirs, etc., should take as purchasers.¹⁴

The rule has also been applied in limitations of estates *pur auter vie*. Thus, if an estate for three lives be given to M. for life, and the land afterwards to M.'s heirs, M. takes the whole property.¹⁵

§ 633. **Same—12. Application of Rule in Shelley's Case to Wills.** There seems to be no essential difference in the application of the rule to wills and to deeds. The rule is not a medium for ascertaining the intent, but supposes the intent to be ascertained by the methods usually employed therefor. Wills being, for the most part, more complicated in their provisions, and less formal in their phraseology, a difficulty is more frequently experienced in determining the intention in them than in the case of deeds; and this appears to be the only diversity between the two classes of assurance in this particular. Where the estate is so given that, after the limitation of a freehold to the ancestor, it is to go to every person who can claim as heir to the ancestor, the word "heirs" must be a word of limitation. That is, if the limitation to the heirs is so calculated and directed that the person claiming under it must entitle himself merely under the description of heir to the first taker, in the technical sense of the word, and if there is nothing to restrain the same words from equally extending to and comprehending all other persons successively answering the same description, or from entitling them alike under it, and *eo nomine* only, then, whether the limitation be contained in a deed or a will, the rule applies, and the ancestor takes an estate of inheritance.¹⁶

It is also to be observed that in wills words may be given the effect of words of limitation, and be construed as equivalent to the words "heirs" or "heirs of the body," which would not have such meanings if used in deeds. Indeed, in the latter form of conveyance, no words can take the place of "heirs" or "heirs of the body," so as to allow application of the rule in Shelley's Case. But in wills such words as "issue," "descendants," "offspring,"

¹⁴ 2 Min. Insts. 407, 408; Fearne, Rem. 492 et seq., note (a).

¹⁵ 2 Min. Insts. 408; Fearne, Rem. 496.

¹⁶ 2 Min. Insts. 408; Fearne, Rem. 186 et seq., 194 et seq., 199 et seq.; 2 Th. Co. Lit. 147, note (P); *Jones v. Morgan*, 1 Bro. Ch. 219 et seq.; *Roe v. Bedford*, 4 M. & S. 364; *Taylor v. Cleary*, 29 Grat. (Va.) 448, 452.

"seed," and sometimes even "children," when used to denote an indefinite succession, suffice for the operation of the rule.¹⁷

§ 634. **Same—13. Application of Rule to Trust Estates.** The important distinction here is between trusts executory, where, as generally happens in marriage articles, the actual and complete drafting of the limitation is referred to a future conveyance or settlement which is directed to be afterwards made, and trusts executed, where the limitation is finally drafted as it is to stand, and no such executory medium is contemplated. In executed trusts, the rule in *Shelley's Case* is applied with scarcely less uniformity than in legal estates; whilst in executory trusts, the court regards the end and consideration of the transaction, and will construe the projected limitation to the heirs to carry the inheritance to the ancestor, or to give an estate by way of contingent remainder to the heirs, as will best subserve the apparent intent.¹⁸

§ 635. **Effect upon Remainder of Subsequent Destruction or Termination of Particular Estate—1. In Case of Vested Remainder.** A vested remainder, once validly created, with a particular estate preceding it, is not affected by any subsequent destruction or termination of the particular estate, except that such destruction or termination may in some instances accelerate the possession and enjoyment of the property by the remainderman.¹⁹

§ 636. **Same—2. In Case of Contingent Remainder—A. At Common Law.** The destruction or termination (not the mere transfer to another) of the particular estate before the remainder is ready to vest in interest always at common law defeats the remainder, in pursuance of that characteristic feature, already adverted to, that a remainder must vest in right during the continuance of the particular estate, or *eo instanti* that it determines.²⁰

A contingent remainder, therefore, may fail as to one part, and take effect as to another, wherever the particular estate is in several persons, as tenants in common or in severalty, or the remainder is limited to several, some of whom may come in *esse* before the determination of the particular estate, and others not.²¹

Thus, if lands be limited to A. and B. as tenants in common, or in separate portions, for their lives respectively, remainder to the

¹⁷Ante, § 143.

¹⁸2 Min. Insts. 408, 409; *Fearne*, Rem. 55, 90 et seq., 114 et seq., 136 et seq., 143 et seq.; 1 Preston, Est. 382 et seq., 387 et seq.; 2 Th. Co. Lit. 145, note (P).

¹⁹Post, § 638; 2 Min. Insts. 391, 392; 2 Th. Co. Lit. 134; 1 Tiffany, Real Prop. § 128.

²⁰Ante, § 594; 2 Min. Insts. 392, 423; 2 Bl. Com. 171.

²¹2 Min. Insts. 423; 2 Th. Co. Lit. 137, note (K).

heirs of Z., and A. dies in the lifetime of Z., the remainder at common law will fail as to A.'s part of the land, whereas, supposing B. to survive Z., it will be good as to B.'s. And so if land be limited to A. for his life, remainder to the unborn children of Z., the remainder will be good as to so many of Z.'s children as are born in A.'s lifetime, and void as to those born afterwards.²²

So, also, in case of a limitation by way of remainder to a class, such as children, the remainder fails at common law as to all members of the class who come into being or come within the description of the class after the termination of the particular estate.²³ But even at common law, in case of a remainder to children, etc., a child en ventre sa mere at the termination of the particular estate is regarded as in being and ascertained, so that the remainder to him, being vested, will not fail.²⁴ And so, upon a grant to A. for life, remainder to B. if he survives C., the remainder to B. fails at common law if A. die before C.²⁵

It may be observed that these common-law principles as to the failure of a contingent remainder because of a gap or interval between the particular estate and the remainder are founded on the rules governing the legal seisin, and never applied to equitable remainders; the seisin in such case being vested in the trustee and not in the particular tenant.²⁶

In order that these principles apply, it is immaterial whether the particular estate runs out its regular termination, or whether it be destroyed before its regular expiration by some supervening cause or act. In either event, if the particular estate ceases to exist before the remainder vests in right, the remainder fails at common law.

Thus, where the particular tenant forfeits his estate by breach of an implied condition, as by tortious conveyance,²⁷ and the grantor enters for the breach, while the grantor is thereupon for some purposes seised under, and not paramount to, the particular tenant,²⁸ so that he cannot avoid the charges and incumbrances created by the latter as he might in the case of entry for breach of express condition,²⁹ yet it seems the particular estate is by such entry de-

²² 2 Min. Insts. 423.

²³ Ante, § 606; 1 Tiffany, Real Prop. § 123; 2 Jarman, Wills, 1027; Festing v. Allen, 12 M. & W. 279; Demill v. Reid, 71 Md. 175, 17 Atl. 1014.

²⁴ 2 Min. Insts. 393, 394; 1 Tiffany, Real Prop. § 123.

²⁵ Price v. Hall, L. R. 5 Eq. 399.

²⁶ 1 Tiffany, Real Prop. § 123; 2 Jarman, Wills, 1027; Fearne, Rem. 303; Abbiss v. Burney, 17 Ch. Div. 211.

²⁷ Ante, §§ 196, 329, 466; 2 Min. Insts. 111, 423.

²⁸ Ante, § 466; 2 Min. Insts. 56, 131, 267; 2 Th. Co. Lit. 117.

²⁹ Ante, § 473.

feated (not merely transferred), although the grantor is not seised as of his original estate, but only of an estate of like duration as that of the particular estate which his entry determined.³⁰ Hence such a forfeiture and consequent entry defeats a contingent, but does not affect a vested, remainder; the latter taking effect in possession, at the time originally proposed.³¹

So, wherever the particular estate and the inheritance come together in the same hands, by act of the parties (except where the coalition occurs by the instrument which created the particular estate and the remainder), the particular estate is merged, and ceases to exist, and the intermediate contingent remainders depending on such particular estate are, at common law, destroyed. Thus, if A. be tenant for life, remainder after the death of Z. to B. for life, remainder to W. in fee, and whilst B.'s remainder is in contingency A. buys W.'s remainder in fee, A.'s life estate is thereby merged, and B.'s contingent remainder is destroyed.³²

§ 637. **Same—B. Trustees to Preserve Contingent Remainders.** The method formerly employed in England to prevent the destruction of contingent remainders, by reason of the determination or destruction of the particular estate pending the contingency (which is said to have been invented by Sir Orlando Bridgeman and other eminent counsel during the time of the civil wars, A. D. 1643 to 1660), is by the intervention of an estate to trustees for the residue of the period of the particular tenant's estate, and until the remainder is ready to vest in interest, to commence whenever his estate shall come to an end. Thus, an estate is limited to A. for life, remainder, in case that estate should come to an end or be in any wise destroyed before the subsequent remainder is ready to vest in interest, to a trustee, Z., and his heirs, until the contingent remainder is ready to vest in interest, remainder to B.'s unborn son.³³

But by act of Parliament (1845) ³⁴ it is now provided in England that a contingent remainder shall not be liable to fail, or to be destroyed or barred, merely by reason of the destruction or merger of any preceding estate, before the vesting of the remainder or the determination of such preceding estate, by any other means than the natural effluxion of time, or some event on which it was in its creation limited to determine.³⁵

³⁰ 2 Min. Insts. 423, 424; 2 Th. Co. Lit. 117.

³¹ 2 Min. Insts. 424.

³² 2 Min. Insts. 424; Fearne, Rem. 340; Purefoy v. Rogers. 2 Saund. 386.

³³ 2 Min. Insts. 423; 2 Bl. Com. 171, 172; Fearne, Rem. 326 et seq.; 2 Th. Co. Lit. 137, note (K).

³⁴ 7 and 8 Vict. c. 76.

³⁵ 2 Min. Insts. 424, 425; Hill, Trustees, 490, 491.

In most of the states of this country there exist statutes modeled on the English act of Parliament; but in the states in which there is no such legislation the device of trustees to preserve contingent remainders is still resorted to.³⁶

§ 638. **Acceleration of Remainders.** When a remainder is vested in right, the enjoyment of the possession only being postponed to a future day, the premature happening of the event upon which the remainderman is to come into possession, such as the premature termination or the destruction of the particular estate, does not (as in the case of a contingent remainder at common law) destroy the remainder, but causes it, or rather the enjoyment of the possession of it, to be "accelerated."³⁷

Thus, when land is granted or devised "to A. for life, remainder to B. in fee," and A. cannot take because of some personal incapacity to receive the title (as where A. is an alien enemy), B.'s remainder is accelerated; that is, his enjoyment of the possession begins at once, instead of awaiting the death of A.³⁸

So, where the particular tenant is the testator's widow, and she renounces the testamentary provision, electing to take the interest in her deceased husband's estate given her by law, the remainder following upon her particular estate is accelerated.³⁹ And so, if the particular estate is destroyed by forfeiture for breach of implied condition or by merger, it would seem the same result would follow.

So upon a devise to A. for life, remainder to C. for life, remainder to X. in fee, if C. should die during the lifetime of A. and X., the remainder to X. is thereby accelerated, so as to take effect immediately upon A.'s death.⁴⁰

And if the vested remainder is preceded by a contingent remainder which fails to take effect, as where land is granted or devised "to A. for life, remainder, if B. survive C., to B. for life, remainder to D. in fee," and B. dies before C., in such case D.'s remainder is accelerated.⁴¹

³⁶ 2 Washburn, Real Prop. (6th Ed.) § 1600.

³⁷ 1 Tiffany, Real Prop. § 128; 1 Jarman, Wills, 536.

³⁸ 1 Tiffany, Real Prop. § 128; Jull v. Jacobs, 3 Ch. Div. 712; Darcus v. Crump, 6 B. Mon. (Ky.) 363; Key v. Weathersbee, 43 S. C. 414, 21 S. E. 324, 49 Am. St. Rep. 846.

³⁹ 1 Tiffany, Real Prop. § 128; Timberlake v. Parish, 5 Dana (Ky.) 345; Fox v. Rumery, 68 Me. 121; Adams v. Gillespie, 55 N. C. 244; Parker v. Ross, 69 N. H. 213, 45 Atl. 576; Milliken v. Welliver, 37 Ohio St. 460.

⁴⁰ Jordan v. Richmond Home for Ladies, 106 Va. 710, 56 S. E. 730.

⁴¹ 1 Tiffany, Real Prop. § 128; 1 Jarman, Wills, 536; Goodright v. Cornish, 1 Salk. 226.

It is to be observed that a contingent remainder, not having the capacity to take effect in possession until the happening of the contingency, even though the possession become vacant, is not susceptible of acceleration,⁴² but, on the contrary, is destroyed at common law upon the failure or destruction of the particular estate before the remainder is ready to vest.⁴³

§ 639. Alternative Remainders. We have seen that it is a general principle of the law, growing, indeed, out of the very nature of things, that there cannot be a remainder limited after a vested fee simple, for the fee simple is the whole estate, and that once disposed of there can be nothing left to give to another by way of remainder. It is just as impossible to have a remainder after a vested fee simple as it is for the grantor to have a reversion after the grant of a fee simple.⁴⁴

But if the fee simple is given conditionally or contingently only, so that it is not vested, but dependent for vesting upon the happening of a condition precedent, there is no reason why the grantor should not be permitted to make an alternative disposition of the fee simple, to vest only in case the first fails to vest. Such limitations are recognized as good contingent remainders at common law, and are known as "alternative remainders," or sometimes as "remainders upon a contingency in a double aspect" or as "remainders upon a double contingency."⁴⁵

Thus, in *Lodding v. Kime*,⁴⁶ the limitation was to A. for life and if he have a son to that son in fee simple, and if he have no son then to B. in fee. It was held that both remainders were contingent until a son was born to A., when the remainder to A.'s son would vest, and B. be excluded and his remainder destroyed; while, if no son was born to A., B.'s remainder would vest upon A.'s death.

§ 640. Cross Remainders—1. Expressly Limited. When land is given to two or more, either severally or as tenants in common, it frequently happens that a particular estate is limited to each of the grantees in his share, with remainder over to the other or others of them in case they should happen to survive, or in case the first taker should die without heirs of his body, etc., and so reciprocally;

⁴² 1 Tiffany, Real Prop. § 128; *Augustus v. Seabolt*, 3 Metc. (Ky.) 155; *Purdy v. Hayt*, 92 N. Y. 446; *Dale v. Bartley*, 58 Ind. 101.

⁴³ Ante, § 720.

⁴⁴ Ante, § 595.

⁴⁵ Ante, § 595; 2 Min. Insts. 395; 1 Tiffany, Real Prop. § 125; *Fearne*, Rem. 373; *Lodding v. Kime*, 1 Salk. 224; *Allison v. Allison*, 101 Va. 556, 44 S. E. 904, 63 L. R. A. 920; *Francks v. Whitaker*, 116 N. C. 518, 21 S. E. 175; *Demill v. Reid*, 71 Md. 175, 17 Atl. 1014; *Taylor v. Taylor*, 63 Pa. 481, 3 Am. Rep. 565.

⁴⁶ 1 Salk. 224.

as if a man give lands to his two children for their lives, as tenants in common, and direct that, upon the failure of heirs of the body of one of them, his share shall go over to the other in fee, and vice versa.⁴⁷

Such ulterior limitations are always contingent by reason of the uncertainty of the remainderman, and are styled cross remainders, because each of the grantees has reciprocally a remainder in the share of the other; and it is a rule respecting them that in a deed they can be given only by express limitation, and shall never be implied, though it is otherwise with respect to wills, which are expounded more liberally, with a view to the presumable intent of the donor, for in these, cross remainders can be raised, not only by actual limitation, but by any expression from which the design to create them can be reasonably inferred. It is said that, even in a will, although cross remainders are favored as between two, yet among more than two the presumption is against them, subject still, however, to be controlled by a plain intention to the contrary.⁴⁸

Thus, if A., seised in fee, devises land to B., C., and D. for their lives, whether in severalty or as tenants in common, with remainder as they respectively die, and after their respective deaths to the survivors or survivor, such remainders are cross remainders, and on the death of B. his land will remain to C. and D. as tenants in common, and on the death of C. the whole will remain to D. for his life.⁴⁹

And so, under the doctrine of entails, if the devise had been to B., C. and D., and the heirs of their bodies, as tenants in common, with remainder, in case any of them should die without issue, to the survivors or survivor, B.'s land at his death without issue would remain to C. and D. as tenants in common in tail, and on the death of C. and failure of his issue the whole would remain to D. in tail.⁵⁰

These, it will be observed, are instances of cross remainders express, and in none of them would the next remainderman or reversioner be entitled to the land, until all the particular estates to B., C. and D., and the remainders also to those parties, were determined.⁵¹

§ 641. **Same—Shares of Survivors.** If there be a limitation to A., B. and C. for their lives, with cross remainders between them,

⁴⁷ 2 Min. Insts. 500.

⁴⁸ 2 Min. Insts. 500; 1 Stephens, Com. 326; 1 Th. Co. Lit. 774 et seq., note (I). See *Howbert v. Cauthorn*, 100 Va. 654, 42 S. E. 683.

⁴⁹ 2 Min. Insts. 1075.

⁵⁰ 2 Min. Insts. 1075.

⁵¹ 2 Min. Insts. 1075; *Chaddock v. Cowley*, Cro. (Jac.) 695; *Broadbuss v. Turner*, 5 Rand. (Va.) 308.

upon A.'s death the right to his share undoubtedly passes to B. and C. But upon the subsequent death of B. some question may be raised whether C. becomes entitled by way of cross remainder to both the original and the accrued shares of B., or only to his original share.⁵²

§ 642. Same—2. Cross Remainders Implied in Wills. In deeds, cross remainders do not arise without express limitation, or at least without words clearly expressing an intention to give them; but in wills they may be freely created by implication, wherever it appears from the testator's language to have been his intention that the whole estate should go over to the ulterior remainderman, or, by way of reversion, to the heir at law all together, and that no part of it should pass or descend to him till the happening of the particular event indicated, such as the failure of issue on the part of all the first takers.⁵³

Thus, where a man having two sons devised part of his lands to one of them and his heirs, and the remaining part to the other and his heirs, adding, "I will that the survivor of them shall be heir to the other, if either of them die without issue," it was held that they were tenants in common in tail, with cross remainders implied.⁵⁴

And so a devise "to my two daughters, E. and A., and their heirs, equally to be divided between them, and in case they happen to die without issue then I give and devise all the said lands to my nephew," creates estates tail in the two daughters with cross remainders.⁵⁵ The implication, however, must be a necessary one, or else the cross remainders do not arise.⁵⁶

It was at one time conceived that cross remainders could not be implied between more than two persons, in consequence, it was said, of the confusion which would arise from the division of the estate among many, as by reason of the uncertainty which might exist whether the surviving shares should vest in the parties as joint tenants, or as tenants in common, and for what estate, and also for the technical reason (merely feudal) to avoid the splitting of tenures, and consequently of services.⁵⁷

⁵² See 2 Min. Insts. 500; 1 Tiffany, Real Prop. § 126.

⁵³ 2 Min. Insts. 1076; Cooper v. Jones, 3 B. & Ald. 425; Pery v. White, Cowp. 780, 781; Phippard v. Mansfield, Cowp. 800.

⁵⁴ 2 Min. Insts. 1076; Chadock v. Cowley, Cro. (Jac.) 695.

⁵⁵ 2 Min. Insts. 1076; 3 Lom. Dig. 371.

⁵⁶ 2 Min. Insts. 1076; Comber v. Hill, 2 Stra. 969; Davenport v. Oldis, 1 Atk. 579.

⁵⁷ 2 Min. Insts. 1076, 1077; Gilbert v. Wiltz, Cro. (Jac.) 655; Cook v. Garrard, 1 Saund. 185a, note (6); Pery v. White, Cowp. 780.

But this doctrine has been essentially modified for a century past, the true rule being, as was observed by Lord Mansfield in *Pery v. White*,⁵⁸ that wherever cross remainders are to be raised by implication between two, and no more, the presumption is in favor of cross remainders; where they are to be raised between more than two, there the presumption is against cross remainders. But this presumption may be answered by circumstances of plain and manifest intention either way.⁵⁹

§ 643. *Same—Instances of Implied Cross Remainders.* Thus, where land is devised to several persons (if more than two, the presumption is against the cross remainder) for their respective lives, and after their deaths (or after the death of the last survivor of them) to other persons, the life tenants *prima facie* take cross remainders for life by implication, since the property is not to go over to the ultimate remaindermen, until the death of the last life tenant; an intention to bring all the property together being presumed.⁶⁰

So, where lands are devised to several persons in tail, but, upon a failure of the issue of all of them, with a limitation over to another, cross remainders in tail are implied of necessity after the termination of the respective estates tail in each by the failure of his issue.⁶¹ Thus, if there were a devise to A. and B. as tenants in common in tail, and if both should die without issue to Z. in fee, cross remainders in tail are mutually implied between A. and B., because it is plain that the testator did not design the ulterior remainder to Z. to take effect until the issue of both A. and B. failed; and, if there were no such implication, then on A.'s dying without issue, living B., his estate tail would have expired, and yet there would be no person provided by the will to take the property, and hence the testator would be, as to that interest, intestate, when it is manifest that he did not design to be so.⁶² But in those states in which estates tail have been abolished by converting them into estates in fee simple, this instance of cross remainders can no longer exist as such, because no remainder can be limited after a fee simple.⁶³

⁵⁸ Cowp. 780.

⁵⁹ 2 Min. Insts. 1077; *Pery v. White*, Cowp. 780; *Phippard v. Mansfield*, Cowp. 800; *Atherton v. Pye*, 4 T. R. 713.

⁶⁰ *Ashley v. Ashley*, 6 Sim. 358; *Dow v. Doyle*, 103 Mass. 489; *Kerr v. Verner*, 66 Pa. 326; *Smith v. Usher*, 108 Ga. 231, 33 S. E. 876; *Glover v. Stillson*, 56 Conn. 316, 15 Atl. 752.

⁶¹ 2 Min. Insts. 1077; 2 Jarman, Wills, 1339 et seq.; *Doe v. Webb*, 1 Taunt. 234; *Allen v. Trustees of Ashley School Fund*, 102 Mass. 262; *Hall v. Priest*, 6 Gray (Mass.) 18; *Pierce v. Hakes*, 23 Pa. 231.

⁶² 2 Min. Insts. 1078; 2 Jarman, Wills, 556 et seq.

⁶³ 2 Min. Insts. 95, 454 et seq., 1077; ante, § 595.

In case of a devise to several persons in tail (in England), assuming the intention to be clear that the estate is not to go over to the remainderman until all the devisees shall have died without issue, the effect of not implying cross remainders among the tenants in tail would be to produce a chasm in the limitations, inasmuch as some of the estates tail might be spent, while the ulterior devise could not take effect until the failure of all.⁶⁴

But in case of a devise in fee, as the primary gift includes the testator's whole estate or interest, and that interest remains in the objects in every event, until, by the terms of the limitation, it is divested, a partial intestacy can never arise, for want of implying a limitation to the other co-devisees. On the contrary, to introduce cross limitations by implication amongst the co-devisees in such a case would be to divest a clear and unambiguous absolute gift, upon the mere conjecture that the testator designed it, when, if he has willed such a result, he has, at all events, not plainly signified it.⁶⁵

Cross remainders are implied after an estate tail, in such case, as we have seen, in order to avoid an undesigned intestacy on the part of the testator. But if the devise be to A. and B. as tenants in common in fee simple, but if both should die under thirty (or should die without issue, etc.) to Z. in fee, if A. dies under thirty (or without issue, etc.), there is no need, in order to effectuate the testator's purpose, to suppose that A.'s part was designed to devolve upon B., since it may descend to A.'s heirs until the event happens upon which it is to go over to Z.; that is, the death of both A. and B. under thirty (or without issue, etc.). Hence there is no necessity to imply a cross limitation in such a case, and in the absence of such necessity it will not be implied.⁶⁶

§ 644. Restrictions upon Period within Which a Contingent Remainder may Validly Vest in Right—Enumeration. An essential principle of policy in all well-regulated states is that property should not be permitted to be so limited as to restrict its free alienation and circulation through the various channels of trade and commerce. We have already seen instances of the application of this principle in the reasons leading to the establishment of the rule in *Shelley's Case*,⁶⁷ and in the condemnation of conditions imposing unreasonable restraints upon the alienation of fee-simple estates.⁶⁸

But these precautions would in large measure be vain, if the owner of land might by deed or will create estates in futuro, de-

⁶⁴ 2 Min. Insts. 1077.

⁶⁷ Ante, § 620.

⁶⁵ 2 Min. Insts. 1077, 1078.

⁶⁸ Ante, §§ 151, 516, et seq.

⁶⁶ 2 Min. Insts. 1078; 2 Jarman, Wills, 556 et seq.

pendent upon some contingency, the happening of which might be postponed for generations, during all of which time the alienability of the land would be destroyed or greatly impaired, and the general usefulness of the property curtailed in proportion. Hence it is necessary that measures be adopted by the law to prevent the creation of contingent interests which by their terms are to vest in right at an unreasonably remote period in the future.

It is to be especially observed that it is the remote vesting in right and not in possession that is to be objected to; for, if the remainder or limitation be vested in right, any uncertainty of title or right is removed, and the land becomes alienable with comparative freedom. A vested remainder is never void for remoteness, however long the possession may be deferred; as in case of a grant to A. in fee tail, remainder to B. and his heirs, in which case, though the fee tail may not come to an end for generations, so that the enjoyment of the possession by B. or his heirs may be deferred indefinitely, yet B.'s remainder is a perfectly valid vested remainder.⁶⁹

But in the case of contingent remainders the law imposes several checks, more or less effective, upon the long deferred vesting of the estate, as follows: (1) The postponement of the vesting is limited by the duration of the particular estate; (2) contingent remainders to children, heirs or issue of unborn persons are not permitted; and (3) applicability to contingent remainders of the ordinary rule against perpetuities.

§ 645. **Same—1. Postponement of Vesting of Contingent Remainders Limited by the Duration of the Particular Estate.** The ability to tie up lands by way of contingent remainder and keep them out of the channels of trade is checked in large measure by the requirement of the common law that such remainders must vest in right during the continuance of the particular estate, or at the very moment it determines, or else it is void;⁷⁰ for, since the particular estates are usually estates for the lives of persons in being, the remainder in such case must be so limited as to vest, if at all, within such lives in being or immediately upon their termination.⁷¹

But cases might arise in which the preceding particular estate is a fee tail, or a succession of limitations of life estates to persons, some of whom might not be in esse, so that this check, whereby

⁶⁹ 2 Min. Insts. 456; Fearne, Rem. Butler's Note, c. 1; Gray, Perpet. § 111; Soday's Case, 9 Co. 128a; Webb v. Hearing, Cro. (Jac.) 415; Pells v. Brown, Cro. (Jac.) 590; Atty. Gen. v. Sutton, 1 P. Wms. 758, 766; Doe v. Ellis, 9 East, 382; Denn v. Puckey, 5 T. R. 303; See v. Craigen, 8 Leigh (Va.) 449.

⁷⁰ Ante, § 594.

⁷¹ See 2 Min. Insts. 414.

contingent remainders might be kept within reasonable limits, was not always applicable, even at common law.

§ 646. **Same—2. Contingent Remainders to Children, Issue, Heirs, etc., of an Unborn Person are Void.** Another check upon the tying up of land indefinitely by way of contingent remainder, much more effectual than that just mentioned, is provided by the common-law rule that no remainder is valid which is to the heirs, heirs of the body, issue, descendants, children or child, sons or son, etc., of an unborn person. Hence, in case of a limitation to a person in esse (A.) for life, and after his death to his unborn child for life, remainder to the eldest son (or heirs, issue, children, etc.) of such unborn child, the last remainder is void, even though A. has a child during the continuance of the particular estate, and though a son be born to that child before A.'s death.⁷²

Thus, future limitations by way of contingent remainder are restricted to quite narrow limits in respect to inalienability, in no case by possibility exceeding a life or lives in being and some years over.⁷³

§ 647. **Same—3. Applicability to Contingent Remainders of Ordinary Rule against Perpetuities.** The difficulty, now under discussion, of preventing the tying up of future contingent estates has been also felt—more acutely, indeed—in the case of interests limited by way of executory limitation. To the latter class of limitations the courts have long applied a rule, known as the rule against perpetuities, presently to be discussed at length,⁷⁴ namely, that no contingent executory limitation shall be valid, unless by its terms it must necessarily vest in right, if it vests at all, within life or lives in being and ten months (the period of gestation) and twenty-one years thereafter.

⁷² 2 Min. Insts. 414; Fearne, Rem. 250, 502; 1 Th. Co. Lit. 128, note (F); Williams, Real Prop. 274, 469; Whitby v. Mitchell, 44 Ch. Div. 85; Cholmley's Case, 2 Co. 51b. This rule had its origin in the more general principle (not now, however, regarded as of universal application, by any means, 2 Washburn, Real Prop. 254; Williams, Real Prop. 227, 253, note 2; Cole v. Sewell, 2 H. L. Cas. 186) that no contingent remainder shall be valid if limited upon a double possibility; that is, upon two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it. This is called a possibility upon a possibility, and according to the older authorities is never admitted. 2 Min. Insts. 413, 414; Fearne, Rem. 250; 1 Th. Co. Lit. 128, note (F); Cholmley's Case, 2 Co. 51b. Thus, while a remainder limited to the first-born son of B. (a living person), who has no son then born, is valid, it is void if limited to the first-born son of B., named Thomas. 2 Min. Insts. 414. But this conclusion is now denied. 2 Washburn, Real Prop. 254; Cole v. Sewell, 2 H. L. Cas. 186.

⁷³ 2 Min. Insts. 414.

⁷⁴ Post, § 694 et seq.

The question now to be discussed is whether this same rule is applicable to contingent future estates arising by way of contingent remainder as well as to those arising by way of executory limitation.⁷⁵

Mr. Williams contends that there are two different rules against perpetuities—one, just mentioned, for executory limitations, and the other, considered in the preceding section, for contingent remainders.⁷⁶ Professor Gray, on the other hand, insists that there is but one rule, and that is the one admittedly applicable to executory limitations.⁷⁷

In England, Mr. Williams' view seems to have been recently sustained in *Whitby v. Mitchell*,⁷⁸ where it was held that a remainder limited to the children of an unborn person was void, even though the settlement expressly added the words, "provided such children shall be born within life or lives now in being and twenty-one years thereafter." Upon the assumption that this proviso would have made the estate valid, had it been an executory limitation,⁷⁹ this decision seems to indicate that Mr. Williams' contention is regarded as sound, and that in England the rule for contingent remainders declaring that a remainder to the child of an unborn person is void is considered an independent rule, and not merely one instance of the ordinary rule against perpetuities.⁸⁰

§ 648. Effect upon Remainder of Illegality of Contingency. The law will never adjudge a grant good by reason of a possibility or expectation of a thing which is against law, for that, says Lord Coke, is "*potentia remotissima et vana, which, by intendment of law, nunquam venit in actum.*" Hence, a remainder to an unborn, or rather to an unbegotten, bastard, it is said, is void, for "the law does not favor such a generation." The legality of a contingency on which a remainder is limited becomes sometimes a question in

⁷⁵ In the following discussion of this point, an article by Professor C. A. Graves in 4 Va. Law Reg. 641 et seq., is extensively drawn upon and quoted.

⁷⁶ Williams, Real Prop. (17th Ed.) 469.

⁷⁷ Gray, Perpet. §§ 191 et seq., 201, 284, et seq.; 1 Jarman, Wills, 521 et seq. See *Barnum v. Barnum*, 26 Md. 119, 90 Am. Dec. 103, note.

⁷⁸ 42 Ch. Div. 494, 44 Ch. Div. 85.

⁷⁹ It might, perhaps, be questionable whether, even if this had been an executory limitation instead of a remainder, this proviso would be effectual to bring the case within the rule against perpetuities, without designating or ascertaining the persons or classes of persons during whose lives the limitation was to run.

⁸⁰ The ordinary rule against perpetuities was applied in the following American cases: *Lovering v. Lovering*, 129 Mass. 97; *Hills v. Simonds*, 125 Mass. 536; *Heald v. Heald*, 56 Md. 300; *Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41; *Walker v. Lewis*, 90 Va. 582, 19 S. E. 258.

connection with limitations over, by way of remainder, upon attempts to aliene, charge, or otherwise dispose of the subject, or in the event of insolvency or bankruptcy, being taken in execution, or in any way becoming liable to be vested in a stranger; and such limitations seem to be recognized as legal, notwithstanding they may operate to screen the subject from the debts of the owner. So far as that result is concerned, however, it would appear that the property must not move from the party for whose benefit the stipulation is made, who cannot be permitted to hedge his effects about with exemptions from liability for his own debts, however a stranger may so contrive that what he gives to another shall be thus exempt from the debts of the donee.⁸¹

§ 649. Same—Contingency Repugnant to Some Rule of Law, Self-Contradictory, or Inconsistent with the Nature of the Particular Estate. Those cases where the contingency upon which the subsequent limitation is intended to take effect is repugnant to some rule of law, or contrariant in itself, or inconsistent with the quality or nature of the particular estate, and where, consequently, the remainder is void, demand special attention.

Thus a contingency upon which a remainder is limited must determine or avoid the whole, and not a part only, of the estate to which it is annexed; and, therefore, a limitation whereby a preceding estate for life or in tail is interrupted for a certain period, to be again afterwards revived, with a remainder following, is not admissible, and the remainder is void. Suppose, for instance, that there is a grant to A. in tail, provided that, if A. make any attempt to aliene or discontinue the estate tail, the same shall absolutely cease during his life, as though A. were naturally dead, and thereupon the premises shall remain to B. for the residue of A.'s life, and after A.'s death shall remain and descend to the heirs of A.'s body, as if no interruption had occurred; the remainder limited to B. is void, because it is limited upon a contingency repugnant to the rule of law above-mentioned, namely, that the whole, and not a part only, of an estate must be avoided by a proviso, or else the same is of no effect. The remainder is further void, because the proviso is repugnant to the nature and quality of an estate tail, in prohibiting the alienation thereof, even by fine, etc. And, again, the remainder is void,

⁸¹ 2 Min. Insts. 413; Fearne, Rem. 249, note (A); Cholmley's Case, 2 Co. 51b; 2 Th. Co. Lit. 128, note (F); Lockyer v. Savage, 2 Stra. 947; Kidney v. Coussmaker, 1 Ves. 436, Sumner's note; Ex parte Cooke, 8 Ves. 353, Sumner's note; Shee v. Hale, 13 Ves. 407, Sumner's note; Higginbotham v. Holme, 19 Ves. 91. See Hutchinson v. Maxwell, 100 Va. 176, 177, 40 S. E. 655, 93 Am. St. Rep. 944, 57 L. R. A. 384; ante, § 504.

because the proviso is contrariant in itself, proposing to determine the estate tail as if tenant in tail were dead, whereas such an estate is not determined by the tenant's death, but by his death without issue. And, finally, the remainder is void, because the proviso upon which it is limited proposes to defeat the preceding estate, so that the remainder does not await the regular expiration of that estate.⁸²

§ 650. **Same—Limitation to Take Effect in Derogation or Substitution of Particular Estate Not Valid as a Remainder.** A remainder, by its definition, must await the regular expiration of the preceding estate, and cannot take effect in derogation thereof.⁸³

In the preceding section an instance of such an estate was mentioned. In case of a gift in tail to A., with condition not to aliene in fee by feoffment, remainder to B. in fee, the condition, prohibiting, as it does, not fine, etc., which are legitimate modes of aliening a fee tail, and cannot lawfully be restrained, but a conveyance which is wrongful, is a lawful and valid condition; yet the remainder limited thereupon is void, because it can only take effect in derogation of the preceding estate, and also because, at common law, A.'s estate can only be determined by the re-entry of the grantor, etc., which, as we have seen, defeats the remainder, as well as the particular estate.⁸⁴

Further to illustrate this proposition, suppose a grant to A. until Z. returns from abroad, and then remainder to W.'s unborn son, in fee. This is a valid remainder; but if the limitation had been to A. for life, and if Z. return from abroad, remainder immediately to W.'s unborn son in fee, the limitation would have been void as a remainder for the reason stated, though good as an executory, shifting or conditional limitation.⁸⁵

But whilst no remainder can be valid which is limited to take effect in derogation of the particular estate, it must be observed that, if the contingency has no effect in abridging the particular estate, the remainder may be good; and this consideration will sometimes control the construction (*ut res valeat*, etc.), so as, in a doubtful case, to justify the inference that the words of contingency were not intended to limit the estate of the particular tenant, but to mark the taking effect of the remainder. Thus, if land be granted to A. for life, and if Z. marry W. then remainder to B., the

⁸² 2 Min. Insts. 414, 415; Fearne, Rem. 252 et seq.; Corbet's Case, 1 Co. 84a, note (T), 85a; Mildmay's Case, 6 Co. 40b, 41a. See post, § 650.

⁸³ Ante, §§ 590, 592.

⁸⁴ 2 Min. Insts. 415.

⁸⁵ 2 Min. Insts. 415, 416; Fearne, Rem. 261 et seq.; 2 Th. Co. Lit. 28, 128, note (F); Colthirst v. Bejushin, 1 Plowd. 24, 24a.

contingency shall not be understood as shortening A.'s life estate (for that would avoid the remainder), but as constituting the event upon which B.'s remainder is to vest in interest, awaiting, however, the expiration of A.'s life estate before it comes into possession.⁸⁶

§ 651. **Disposition of the Inheritance Pending the Contingency.** Where a remainder of inheritance is limited in contingency by way of use, or devise (or perhaps grant), the inheritance pending the contingency, if not otherwise disposed of, remains in the grantor or his heirs, or in the devisor's heirs, until the contingency happens to take it out of them. Thus upon a devise to A. for life, remainder to Z.'s heirs, the fee descends upon and remains in the devisor's heirs until by Z.'s death his heirs are developed and ascertained, and then it devolves on them.⁸⁷

Where the limitation of the contingent inheritance is contained, not in a conveyance by way of use, or devise, or grant, but in a conveyance operating at common law, a less uniform doctrine prevails as to the disposition of the inheritance, pending the contingency. Some have held that, in case of a lease to A. for life, remainder to the heirs of B. (B. being living), no estate at all remains in the grantor, and that he cannot enter for the forfeiture, in case of a feoffment in fee by the tenant for life; whilst others, though disinclined to admit that any estate remains in the grantor in such case, still allow him a right of entry for any forfeiture incurred by tenant for life, as well as on the determination of his estate by death before the contingency happens. These opinions are founded on an assumption that the remainder must pass out of the grantor at the time of the livery, and consequently that no estate shall remain in him after such livery; and, therefore, in the case supposed (of a lease to A. for life, remainder to the heirs of B.), they say the remainder is in abeyance, or in nubibus, or in gremio legis, though by way of compromise between common sense and the supposition of the inheritance passing out of a man, where there is no person in *rerum natura*, no object, as Mr. Fearne says, besides hard, and hardly intelligible, words for the reception of it at the time of the livery, they are compelled to admit such a species of interest to remain in the grantor as entitles him to enter and reassume the estate, in the event that the particular estate determines before the contingent remainder can take effect.⁸⁸

⁸⁶ 2 Min. Insts. 416; Fearne, Rem. 262, 363; Colthirst v. Bejushin, 1 Plowd. 23 et seq.

⁸⁷ 2 Min. Insts. 417; Fearne, Rem. 351 et seq.; Clere's Case, 6 Co. 17b; Leonard Lovie's Case, 10 Co. 78, 85b; Purefoy v. Rogers, 2 Saund. 380.

⁸⁸ 2 Min. Insts. 417.

But, if the inheritance passes at all, it seems to be a necessary conclusion that it passes to somebody; whilst, if it does not pass to anybody, one might reasonably suppose that it does not pass at all. However profound a solution of this difficulty, as Mr. Fearne observes, may be discoverable by legal adepts, in the expressions "in abeyance," "in nubibus," or "in gremio legis," it really seems a more arduous undertaking to account for the operation of a feoffment, in annihilating the inheritance, or transferring it to the clouds, and afterwards regenerating or recalling it at the beck of some contingent event, than to reconcile to the principles, as well of common law as of common sense, a suspension of the complete operation of such feoffment, in regard to the inheritance, until the intended channel for its reception comes into existence. The inheritance was in the grantor or testator at the time of making the limitation, and it is confessedly not included in it. The natural conclusion seems to be that it remains where it was, namely, in the grantor, or in the testator's heirs. When the future disposition takes effect, then the interest passes pursuant to the terms of the limitation; but if such future disposition fails of effect, either by reason of the determination of the particular estate, failure of the contingency, or otherwise, what is there then to draw the inheritance out of the grantor or his heirs, or the heirs of the testator? ⁸⁹

§ 652. Effect of Interpolation of Contingent Remainder between Particular Estate and Ulterior Remainder—1. Intervening Remainder Not a Fee Simple. Where the intervening contingent remainder is less than a fee simple, the remainder limited afterwards may be either a vested or a contingent remainder according to the terms of the limitation. There is no necessity, in the nature of things, that it should be contingent.⁹⁰

So there may be a succession of contingent remainders, one of which, though later in order, may become vested while the prior ones remain contingent. Thus, if an estate be limited "to A. for life, remainder to A.'s first and other sons (not in being) in tail, remainder to B. for life, remainder to B.'s first and other sons (not in being) in tail, the remainders to the sons of A. and B., respectively, are contingent, because the remaindermen are not in being, yet the remainder to B. is vested, though following a contingent remainder in tail to the sons of A., and if a son should be born to B. his remainder would also, at once, become vested, though the first remainder in tail to A.'s son still unborn, remains contingent."⁹¹

⁸⁹ 2 Min. Insts. 418; Fearne, Rem. 360 et seq.; 2 Bl. Com. 107, note (8).

⁹⁰ 2 Min. Insts. 418, Fearne, Rem. 223 et seq.

⁹¹ Uvedall v. Uvedall, 2 Rolle, Abr. 119.

In *Napper v. Sanders*,⁹² the feoffor made a feoffment "to her own use for life, remainder to use of feoffees for eighty years, if N. S. and E. S. his wife so long live, and if E. S. survives N. S., her husband, then to her for life, and after her death to B. S. in tail, and upon default of issue to E. N., D. S., and F. S. and the heirs of their bodies, remainder to the heirs of the feoffor."

This limitation is very instructive. If it be analyzed, with reference to the exception to the second class of contingent remainders,⁹³ and to the second exception to the third class of contingent remainders,⁹⁴ it will be found to present the following succession of estates: (1) A life estate in the feoffor; (2) a vested remainder to feoffees for the joint lives of E. S. and N. S.; (3) a contingent remainder to E. S. for her life (contingent upon her surviving N. S., her husband); (4) an estate tail in B. S. by way of vested remainder after the death of E. S. (not being in any way dependent upon E. S. surviving her husband); (5) a joint estate tail, by way of vested remainder, in E. N., D. S., and F. S., after the termination of the estate tail in B. S.; and (6) the so-called remainder to the heirs of the feoffor is not a remainder, nor a case for the operation of the rule in *Shelley's Case*, but is a mere reservation of the reversion in the feoffor, which the law itself would have reserved in her, had she said nothing about it. It operates nothing.⁹⁵

§ 653. **Same—2. Intervening Remainder a Fee Simple.** Where there is a contingent limitation in fee simple absolute, no estate limited afterwards can be vested. Thus, a devise to A. for life, remainder to his issue male and his heirs for ever, and if he die without issue male, remainder to B. in fee, creates in B. a contingent remainder, because the preceding limitation to the issue of A. was contingent and in fee. In such case B. takes an alternative remainder (or a remainder upon a double contingency, or upon a contingency in a double aspect, by all of which names it is designated).⁹⁶ In *Allison v. Allison*,⁹⁷ the limitation was "to my daughter for life, and at her death to be equally divided among her children, should any survive her; if she should die without issue, or if her surviving child or children should die before becoming of age, then the property bequeathed for the benefit of my daughter is to be divided among my heirs at law according to the laws of the state of Virginia." It was held that the remainder to the children was

⁹² Hutt, 117.⁹³ Ante, § 603.⁹⁴ Ante, § 607.⁹⁵ See 2 Washburn, Real Prop. 244.⁹⁶ Ante, §§ 595, 639; 2 Min. Insts. 418; Fearn, Rem. 225, 229; 2 Washburn, Real Prop. 534, 535.⁹⁷ *Allison v. Allison*, 101 Va. 555, 44 S. E. 904, 63 L. R. A. 920.

a contingent remainder in fee, and, that being so, the subsequent limitation to the testator's heirs at law was also contingent, though the heirs meant were such as existed at the testator's death, and were, therefore, ascertained persons. It is to be observed, also, that, while the court speaks of this last limitation as a "remainder," it is not strictly so in fact, but is a quasi reversion or possibility of reverter in the testator's heirs, being an instance of the second exception to the third class of contingent remainders.⁹⁸ In that case, the distinction was immaterial.

Upon this principle, it has been sometimes insisted that if a limitation be made to A. for life, with power to appoint in fee simple, and in default of appointment to B. in fee, the existence of the power to appoint in fee suspends the effect of the subsequent limitation to B., and keeps it contingent until the exercise of the power becomes impossible.⁹⁹ But the better opinion is believed to be that any such subsequent remainder, which would not be otherwise contingent, is not made so by the intervention of the power of appointment, but is vested, subject, however, to be divested by a subsequent execution of the power. Thus, where by marriage settlement lands were limited to the wife, as separate estate, for her life, remainder to the husband for life, and then to such of the children of the marriage for such estates and in such parts and proportions as the husband and wife should appoint, and, in default of appointment, remainder to the children of the marriage, as tenants in common in fee simple, it was held that, notwithstanding the power of appointment in the father and mother, the remainder to the children was vested, being liable, however, to be divested if an appointment should be made.¹

The same doctrine applies also to personalty; and where money is absolutely given over in default of appointment, the gift over is vested, subject to be divested by the execution of the power.²

⁹⁸ Ante, § 607.

⁹⁹ 2 Min. Insts. 419; *Leonard Lovies' Case*, 10 Co. 85a; *Walpole v. Lord Conway*, 3 Barnad. Ch. 153; *Smith v. Lord Camelford*, 2 Ves. Jr. 704.

¹ 2 Min. Insts. 419; *Doe v. Martin*, 4 T. R. 39. See *Fearne*, Rem. 229; 2 Sugden, Powers (3d Am. Ed.) 2-4; *Idle v. Cooke*, 2 Ld. Raym. 1150; *Madoc v. Jackson*, 2 Bro. Ch. 588; *Vanderzee v. Aclom*, 4 Ves. 787; *Reade v. Reade*, 5 Ves. 748; *Maundrell v. Maundrell*, 10 Ves. 265; *Cholmondeley v. Clinton*, 2 Jac. & Walker, 40; *Osborne v. Bury*, 1 Ball & Beat. 53, 57; *Campbell v. Sandys*, 1 Sch. & Lefr. 293.

² 2 Min. Insts. 419; 2 Sugden, Powers (3d Am. Ed.) 5; *Gordon v. Levi*, 1 Ambl. 364; *Coleman v. Seymour*, 1 Ves. Sr. 209; *Ld. Teynham v. Webb*, 2 Ves. Sr. 208; *Cholmondeley v. Meyrick*, 1 Eden, 77; *Earl Salisbury v. Lambe*, 1 Eden, 465; *Rooke v. Rooke*, 2 Eden, 8; *Reade v. Reade*, 5 Ves. 748.

§ 654. **Effect upon Ulterior Limitations of Contingency Annexed to Preceding Estate—1. Preceding Estate Subject to Condition Precedent That Never Happens.** If the preceding estate is itself a contingent remainder that never vests because of the nonoccurrence of the condition precedent upon which it is dependent, the general rule of construction is that this does not invalidate the ulterior limitations. The nonoccurrence of the contingency merely affects the preceding estate to which it is at first annexed, without extending to the ulterior limitations.³

Thus, there was a devise to Z. (testator's son) for life, remainder to Z.'s first and other sons by any future wife in tail, with a proviso that, if Z. should afterwards intermarry with anybody akin to M. A., Z.'s then wife, the foregoing limitations to the issue of such future marriage should cease and determine, and the estate should pass to the testator's nephews. After the testator's decease M. A. died, and then Z. died, without issue, and without having married again. The contingency of the son's marrying again, in the manner prescribed, was held to affect only the estates limited to his future issue, and the limitation to the nephews was sustained.⁴

Again, a testator, who had three sisters, for whom he wished to provide, one of whom, however, was married, and during her husband's life would need, as he thought, no assistance, devised lands to trustees in fee, in trust to receive the rents and profits, and pay the same to his sisters E. and M., until the decease of the husband of his sister S., and, in case S. should then be living, to pay the same thenceforward to the three sisters severally, in thirds, for their lives, with remainder, severally, to their first and other sons in tail, remainder over. The married sister, S., died in her husband's lifetime, without issue, and afterwards the other sisters died without issue. It was held that the contingency of S.'s surviving her husband related only to her own life interest in the rents and profits of the lands, and that the subsequent limitations were not affected thereby, and consequently took effect.⁵

The construction, in these cases, appears to depend on the testator's apparent intention not to extend the contingency beyond the estate to which it is annexed. If he seems to have contemplated no distinction, the contingency will equally affect the whole chain of ulterior limitations. Thus, in case of a devise to W. H., the

³ 2 Min. Insts. 419, 420; Fearne, Rem. 234 et seq.

⁴ *Bradford v. Foley*, 1 Dougl. 63; 2 Min. Insts. 419, 420.

⁵ 2 Min. Insts. 420; Fearne, Rem. 234 et seq.; *Horton v. Whitaker*, 1 T. R. 346; *Napper v. Sanders*, Hutt. 119.

testator's son, in tail, and if testator's wife should survive W. H., and he die without issue, remainder to her for life, remainder to M. S. for life, and after her decease (the said W. H. being dead without issue as aforesaid), remainder over, the testator's wife having died before W. H., it was held that the intent was to make, not the wife's life estate alone, but the whole train of subsequent limitations, dependent on the contingency of the wife's surviving W. H. (as was shown especially by his renewing the mention of it in connection with the last), and that, the contingency having failed, the subsequent limitations never took effect.⁶

§ 655. Same—2. Limitation Dependent upon Contingent Termination of a Preceding Contingent Estate That Never Takes Effect. Here the ulterior limitation upon its face appears to be dependent upon two contingencies—(a) that the preceding estate should vest and take effect; and (b) that such preceding estate should determine in a particular manner. The failure of the preceding estate to vest at once eliminates the possibility of the occurrence of either contingency. Yet the general rule of construction in this case, as in the preceding, is that while, if the preceding estate does vest or take effect, its termination in the manner prescribed is a condition precedent to the vesting of the ulterior limitation, it is not the intention to make that a condition precedent under all circumstances, and, if the preceding estate never vests at all, the subsequent limitations are usually allowed to take effect any way; it being presumed that it is not the existence of the preceding estate, but its termination in the prescribed manner in case it does come into existence, that is the condition precedent to the subsequent limitation.⁷

Thus, in case of a devise to trustees for eleven years, remainder to the first and other son (not in being) of B., in tail, provided they should take the testator's surname, and if they would not, or should die without issue, remainder to the first son of C., remainder over, B. died without having had any son, and C. had a son at the time of the devise. It was admitted that the limitation to B.'s sons was good only as an executory devise, the preceding estate not being an estate of freehold, and it was held that the limitation to the son of C. was valid and effectual.⁸

§ 656. Same—3. Limitation Contingent upon Termination of Preceding Estate in a Designated Manner, Where the Estate is

⁶ 2 Min. Insts. 420; Fearne, Rem. 236; Davis v. Norton, 2 P. Wms. 393; Doe v. Shepard, 1 Dougl. 75.

⁷ 2 Min. Insts. 421; Fearne, Rem. 237.

⁸ 2 Min. Insts. 421; Scatterwood v. Edge, 1 Salk. 229; Doe v. Scott, 3 M. & S. 305.

Vested and Terminates Otherwise. In general, where the preceding estate takes place, and the condition is not performed, the remainder will not take effect at the expiration of such preceding estate, save where the apparent general intention calls for it. Thus, in case of a devise to the testator's wife for life, upon this express condition, only, that if she should marry again the property should go forthwith to his eldest son in tail, remainder over, and the wife died without marrying again, Lord Hardwicke, chiefly upon the emphatic language used in stating the contingency, held that the limitation in tail to the son was not vested, but contingent upon the wife's marrying again, which she did not do.⁹

§ 657. **Transfer of Remainders—1. Transfer of Vested Remainders.** A vested remainder is susceptible of transfer, by the common law, to the same extent as an estate in possession, either by conveyance inter vivos, by devise or by descent.¹⁰

But as to the conveyance inter vivos of a vested remainder of freehold, at least if preceded by a freehold, such remainders always lay in grant and not in livery; that is, they passed, even at common law, by deed, and not by livery of seisin, since it was impossible for the remainderman to deliver the seisin, because the seisin would be in the particular tenant and not in the remainderman.¹¹

§ 658. **Same—2. Transfer of Contingent Remainders.** A contingent remainder of inheritance is transmissible by descent to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens, supposing the continued existence of the remainderman not to enter into and make part of the contingency itself, upon which the remainder is intended to take effect. And wherever a contingent remainder is descendible, it is, independently of any statute, devisable by will.¹²

⁹ 2 Min. Insts. 421; Fearne, Rem. 238 et seq.; *Sheffield v. Orrery*, 3 Atk. 282; *Luxford v. Cheeke*, 3 Lev. 125. But if the language used in the limitation in *Sheffield v. Orrery* had been less emphatic, it is probable the limitation would have been construed as if it had read to the testator's wife for life, and upon her remarriage or death to his eldest son in tail, etc., in which case the son's remainder would have been vested. See 1 Jarman, Wills, 759; *Luxford v. Cheeke*, 3 Lev. 125; *Ferson v. Dodge*, 23 Pick. (Mass.) 287; *Aulick v. Wallace*, 12 Bush (Ky.) 531; *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 102.

¹⁰ 2 Min. Insts. 422; *Waring v. Waring*, 96 Va. 641, 32 S. E. 150; *Gardner v. Guild*, 106 Mass. 25; *Wimple v. Fonda*, 2 Johns. (N. Y.) 288; *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395; *Hinkson v. Lees*, 181 Pa. 225, 37 Atl. 338; *Glidden v. Blodgett*, 38 N. H. 74; *Davis v. Bawcum*, 10 Heisk. (Tenn.) 406.

¹¹ 2 Min. Insts. 422; *Wilson v. Langhorne*, 102 Va. 637, 47 S. E. 871.

¹² 2 Min. Insts. 421; Fearne, Rem. 364; *Wilson v. Langhorne*, 102 Va. 638, 47 S. E. 871.

As to conveyances inter vivos, while vested remainders lying in grant as they do pass by deed without livery, a contingent remainder is a mere right or possibility and, except in equity, cannot at common law be transferred before the contingency, otherwise than by estoppel, as by matter of record, or of deed indented, though it may be released to him in possession (the release in such case operating by way of extinguishment).¹³

§ 659. Liability of Remainders for Debts of Remaindermen. It is a general principle of morals as well as of law that any property which the owner may sell or mortgage, and which therefore adds to his general credit in his community, ought also to be, as it usually is, subject to his debts, and liable to be sold therefor at the instance of his creditors.

This principle, generally speaking, is applicable to remainders as well as to other property, and so far as vested remainders are concerned they are fully liable for the owner's debts and may be subjected thereto just as the like property in possession would be.¹⁴

But if the remainder be contingent by reason of the uncertainty of the remainderman, as it is inalienable,¹⁵ so for the same reasons it cannot be subjected by creditors under attachment, judgment, or otherwise. But if the remainderman is ascertained, and his estate is alienable otherwise than by estoppel (in some states such remainders are alienable by statute), it would seem unjust to withdraw it from reach of creditors, and the weight of authority seems to be in favor of subjecting it.¹⁶

¹³ 2 Min. Insts. 422; Fearn, Rem. 365; 1 Tiffany, Real Prop. § 129; Miller v. Emans, 19 N. Y. 385. See post, § 977.

¹⁴ Blanchard v. Brooks, 12 Pick. (Mass.) 47; Drake v. Brown, 68 Pa. 223; Jackson v. Sublett, 10 B. Mon. (Ky.) 467; Ellwood v. Plummer, 78 N. C. 392.

¹⁵ Ante, § 658.

¹⁶ Drake v. Brown, 68 Pa. 223; Jacob v. Howard, 22 S. W. 332, 15 Ky. Law Rep. 133; White v. McPheeters, 75 Mo. 286.

CHAPTER XXVI.

REVERSIONS.

- § 660. Nature of a Reversion.
- 661. Incidents of a Reversion.
- 662. Reversions Distinguished from Remainders.
- 663. Difference in Mode of Descent.
- 664. Difference in Respect of Liability for Grantor's Debts.
- 665. Merger of Particular Estate—Nature of Merger
- 666. Two or More Estates (Not Mere Rights) in Same Land must Meet in Same Person.
- 667. Reversionary Estate must be at Least as Large as Particular Estate.
- 668. The Rights in Which the Several Estates are to be Held.
- 669. Doctrine Where the Several Estates are Limited by the Same Instrument.
- 670. Effect of Intention in Preventing Merger.
- 671. Effect of Concurrence of Legal and Equitable Estates in Same Person.
- 672. Quasi Reversions or Possibilities of Reverter.

§ 660. **Nature of a Reversion.** A reversion is the remnant of an estate continuing in the grantor, undisposed of, after the grant of a part of his interest. It differs from a remainder in that it arises by act of the law, whereas a remainder is by act of the parties. A reversion, moreover, is the remnant left in the grantor, whilst a remainder is the remnant of the whole estate disposed of, after a preceding part of the same has been given away. It is called a reversion from the returning of the land to the possession of the grantor or his heirs, after the estate granted is ended. "A reversion (*reversio*) cometh," says Lord Coke, "of the Latin word *revertor*, and signifieth a returning again; and therefore *reversio terræ tanquam terra revertens in possessione donatori, sive hæredibus suis post donum finitum.*"¹

From the nature of a reversion it is obvious, as has been said, that it is not created, but arises by construction of law, and that it supposes that the grantor has not parted with his whole estate. Hence, upon the grant of a fee simple, whether absolute or qualified, there can be no reversion, for the fee simple is always the whole; but wherever one assigns his whole estate, whether that be in fee, or in life or years, there being no remnant left in him, nor the possession returning to him, there is in like manner no reversion. A distinction is made, however, between a reversion, which is an estate vested in *præsenti*, although to be enjoyed in *futuro*, and

¹ 1 Th. Co. Lit. 138; 2 Min. Insts. 425; 2 Bl. Com. 175.

capable of being transmitted by descent, devise, or grant, and a mere possibility of reverter, such as before the statute *de donis condition-alibus* existed in the case of conditional fees, and now exists in all cases where the fee is limited in contingency, as in base or qualified fees, and in grants to a perpetual corporation during its existence, or to A. for life, remainder to B.'s unborn son in fee.²

The basis of this distinction lies in the fact that reversions are always vested estates, corresponding to vested remainders, while the mere possibility of reverter is always contingent and corresponds to a contingent limitation. A section at the close of this chapter will be devoted to a brief consideration of the latter.

Wherever one possessed of lands grants a smaller estate than his own, he has a reversion; that is, as soon as his grantee's estate is complete and ended, the possession will revert or return to him. A lessor seised in fee leases for years; the lessee's estate does not begin until he enters, and until then, therefore, the lessor has not the reversion.³

One cannot be said to be seised of a reversion after a freehold estate, but entitled to it by a vested right, which the law is as careful to protect as it is to guard those of the tenant in possession; and we have seen that, at common law, if a particular tenant aliened by a tortious conveyance a greater estate than he had, he thereby divested the reversion, and converted the reversioner's right of entry into a right of action, whereby a forfeiture of the particular estate was incurred, and the reversioner was admitted to enter immediately for the forfeiture.

§ 661. Incidents of a Reversion. The incidents of a reversion at common law are fealty and rent.

Fealty is merely the outward token and recognition of the relation of landlord and tenant; and although the outward expression has fallen into disuse with us, the relation, of course, may subsist, and, indeed, even in England, the relation is understood to be referred to, rather than the ceremony, when the word is used there. In this sense, as the mere recognition of the fact of the relation of landlord and tenant, it is manifest that fealty is an inseparable concomitant of the reversion, *ex vi termini*.⁴

Rent is an usual, but not, like fealty, an inseparable, incident to the reversion. If no rent were originally reserved upon the creation of the particular estate, of course none belongs to the reversion; and even though rent were reserved, yet the reversion may be granted excepting the rent, or the rent excepting the reversion. A grant

² 2 Min. Insts. 425, 426; 2 Bl. Com. 175.

⁴ 2 Min. Insts. 427.

³ 2 Min. Insts. 426.

of the reversion, however, if there be nothing to the contrary in the grant, carries the rent with it, as an incident thereto.⁵

§ 662. **Reversions Distinguished from Remainders.** To confound things differing in nature, because of some resemblances, is always undesirable, if for no other reason, because it tends to habits of indistinct thought; but, besides this general consideration, there are some important and essential differences between the two. Thus incidents belong to a reversion, as fealty and rent, which do not attach themselves as of course to a remainder.⁶

Another important difference between the two lies in the fact that the entire doctrine of covenants running with the land and with the reversion has its application in the case of reversion, and has no connection with remainders.⁷

So, also, the right to re-enter for the breach of an express condition pertains to the owner of the reversion only, and never to a remainderman, as such.⁸

Still another important difference is in the nature of the title taken in the two cases. By a remainder a new title is created, the remainderman taking by purchase, while the reversioner merely retains his old title, with its privileges and burdens, modified only by the fact that he has given up the immediate possession and enjoyment of the property to the tenant of the particular estate.

This gives rise to differences (1) in respect of the modes of descent, at common law, of a reversion and a remainder, respectively; and (2) in respect of their liability for the grantor's debts.⁹

§ 663. **Same—Difference in Mode of Descent.** At common law, a reversion descends like the old title, of which, indeed, it is a part, in the same line therewith, and keeping to the blood of the same first purchaser, whilst a remainder is a new estate acquired by purchase, and passes in the line of the new purchaser.¹⁰

§ 664. **Same—Difference in Respect of Liability for Grantor's Debts.** Unless there be a specific lien or charge on the land, the remainderman (being a purchaser) is not liable for the general debts of the grantor from whom he derived the estate, whilst a reversioner must pay the ancestor's debts to the extent of the value of his reversion; that is, at common law, the ancestor's debts of record,

⁵ 2 Min. Insts. 427; 2 Bl. Com. 176; 4 Kent, Com. 355.

⁶ 2 Min. Insts. 427.

⁸ Ante, § 475.

⁷ Ante, §§ 374, 375, et seq.

⁹ 2 Min. Insts. 427, 428.

¹⁰ 2 Min. Insts. 427, 428; 2 Bl. Com. 176, 243. This is the common-law rule; but the student must remember that in this country descents are regulated by statutes, which, while uniform in some respects, differ in the matter of the descent of reversions.

and specialty debts, binding the heirs expressly, and in this country all his debts. Reversions expectant on estates for years are present assets in the hands of the heir; but, if expectant on estates of freehold, they are only quasi assets, to be levied on when they fall in, and in such case the plaintiff may take judgment, *quando acciderint*.¹¹

§ 665. **Merger of Particular Estate—Nature of Merger.** A merger occurs whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the less is immediately annihilated, or is said to be merged—that is, sunk or drowned—in the greater. Thus, if there be tenant for years, and the reversion in fee simple descends to or is purchased by him, the term for years is merged in the inheritance, and shall never exist any more. Its object is to accelerate the possession, or at least the enjoyment of the estate in which the merger takes place. Its effect is to consolidate the two estates, and confound them into one, the measure of which is that of the more remote of the two, which is not enlarged by the accession of the preceding estate.¹²

§ 666. **Same—Two or More Estates (Not Mere Rights) in Same Land must Meet in Same Person.** This proposition leads Lord Coke to discriminate between several estates (e. g., grant to A. for life, remainder to B. for life), and one estate with several limitations (e. g., grant to A. for the life of Z., X., and W.). In the latter case, there is no room for the application of the doctrine of merger; in the former, if A. surrenders to B., or B. releases to A., a merger takes place.¹³

§ 667. **Same—Reversionary Estate must be at Least as Large as Particular Estate.** Thus, an estate at will may merge in an estate for years; estates for years may merge in each other, or in estates of freehold or inheritance; estates for life may merge in each other; estates in fee qualified, or fee conditional, may merge in any estate of like extent with themselves, and a fortiori in the fee simple absolute. But, by the express provision of the statute *de donis*, estates tail are generally privileged from merger.¹⁴

§ 668. **Same—The Rights in Which the Several Estates are to be Held.** The several estates must be held in the same legal right,

¹¹ 2 Min. Insts. 428; 2 Th. Co. Lit. 152, note (R).

¹² 2 Min. Insts. 428, 429; 2 Bl. Com. 177; 2 Th. Co. Lit. 557, note (K). See ante, § 333.

¹³ 2 Min. Insts. 429; 2 Th. Co. Lit. 557, note (K); 3 Preston, Conv. 55 et seq.; Ross' Case, 5 Co. 14.

¹⁴ 2 Min. Insts. 429; 2 Th. Co. Lit. 557, note (K); 3 Preston, Conv. 166 et seq.

or, when held in different legal rights, one of them must not be an accession to the other by the mere act of the law; i. e., it must be by purchase.

Hence, if a husband, possessed of a term in right of his wife, purchases the inheritance in reversion or remainder, or if an executor, possessed of a term in right of his testator, purchases the reversion in fee, in both these instances the term will merge. But when the accession of one estate to the other is merely by act of the law, as by marriage, by descent, by executorship, etc., no merger will ensue where the estates are held in different rights; that is, one of them in one's own private right, and the other in *auter droit*.¹⁵

§ 669. Same—Doctrine Where the Several Estates are Limited by the Same Instrument. The doctrine of merger will not alter the quality of one of two estates in the same person, or destroy a contingent remainder, when the several estates are limited by the same instrument, and some other person is concerned in the merger. Thus, in case of a limitation to A. and B. for their joint lives, remainder to Z.'s unborn son for life, remainder to A.'s heirs, A.'s life estate does not merge in his fee simple, for that would dissolve the jointure, exclude B.'s life estate, and defeat the contingent remainder of Z.'s unborn son.¹⁶

§ 670. Same—Effect of Intention in Preventing Merger. The doctrine of merger does not apply when the union of the two estates arises from the joint act of their respective owners, with an intention that the estate of their assignee should continue for the collective time of their several estates.¹⁷

§ 671. Same—Effect of Concurrence of Legal and Equitable Estates in Same Person. A legal estate cannot merge in an equitable one, but an equitable may, and generally does, merge in a legal one, although not without reference to the intention of the parties. The legal fee governs the order of succession; indeed, the legal title determines the order of succession, as far as the same person has the legal estate, and is the equitable owner; and therefore equitable interests will be absorbed in, and extinguished by, the legal interests as far as they are united, but not beyond the measure of the legal interests.¹⁸

¹⁵ 2 Min. Insts. 429, 430; 3 Preston, Conv. 285 et seq., 309; Braicbridge v. Cook, 2 Plowd. 418; Platt v. Sloop, Cro. (Jac.) 375. See 2 Th. Co. Lit. 557, note (K), 563, note (L), 556, notes (H), (I).

¹⁶ 2 Min. Insts. 430; 2 Th. Co. Lit. 557, note (K); 1 Th. Co. Lit. 744, 746, notes; 3 Preston, Conv. 376 et seq.

¹⁷ 2 Min. Insts. 430; 2 Th. Co. Lit. 557, note (K); 3 Preston, Conv. 50, 409, 441; Bredon's Case, 1 Co. 77a; Treport's Case, 6 Co. 15a.

¹⁸ Ante, § 431; 2 Min. Insts. 228, 430; 2 Th. Co. Lit. 557, note (K); 3 Preston, Conv. 567 et seq.

§ 672. **Quasi Reversions or Possibilities of Reverter.** In contradistinction to reversions, which are vested estates, these interests are contingent, and are well described by the term "mere possibilities of reverter." They arise, at common law, upon a conveyance in fee conditional,¹⁹ or upon the creation of a fee qualified,²⁰ or upon the conveyance of a fee simple upon condition subsequent.²¹ In none of these cases is there any vested interest in the land left in the grantor by way of reversion, but only a bare possibility that the land will return to him, upon the happening or failure to happen of the various contingencies upon which the estate granted may depend. The interest of the grantor is purely contingent.²²

In England it is the recognized doctrine that these interests, like other contingent future interests, are subject to the rule against perpetuities, so that, if land is there conveyed in fee simple upon a condition subsequent, where the contingency upon which it is to terminate may be postponed beyond a life or lives in being and ten months and twenty-one years thereafter, the condition is simply void and the estate absolute and without condition; that is, the grantor's possibility of reverter ceases to exist.²³ But in the United States it seems to be held quite generally that the rule against perpetuities has no application to mere possibilities of reverter.²⁴

At common law these contingent estates could not be conveyed directly at law,²⁵ though they might, perhaps, pass by estoppel.

¹⁹Ante, § 162 et seq.

²¹Ante, § 477.

²⁰Ante, § 160.

²²1 Tiffany, Real Prop. § 116.

²³1 Tiffany, Real Prop. § 155; In re Trustees of Hollis' Hospital, [1899] 2 Ch. 540. See Dunn v. Flood, 25 Ch. Div. 629.

²⁴Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739; Cowell v. Colorado Springs Co., 100 U. S. 55, 25 L. Ed. 547; Tobey v. Moore, 130 Mass. 448; First Universalist Society v. Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; French v. Old South Society, 106 Mass. 479; In re Stickney's Will, 85 Md. 79, 103, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. Rep. 308. See Gray, Perpet. § 304 et seq.; 5 Va. Law Reg. 721.

²⁵Ante, § 658.

CHAPTER XXVII.

EXECUTORY LIMITATIONS.

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§ 673. **Definition of an Executory Limitation.** An executory limitation is defined to be a limitation of a future estate in lands which is contrary to the common-law rules of limitation regulating the creation of remainders, but which is practicable under the statutes of uses and of wills, by reason of their dispensing with actual livery of seisin to create a freehold.¹

§ 674. **No Limitation Once Valid as a Remainder can Ever Thereafter Take Effect as an Executory Limitation.** Since, by its definition, an executory limitation is one which is contrary to the common-law rules governing the creation of remainders, it follows necessarily that no limitation which in its creation was good as a remainder falls within the scope of the definition of an executory limitation, even though, for some cause arising after its creation, it ceases to be good as a remainder. Hence it is a rule of the law that a limitation, once a remainder, is always a remainder, and can never take effect as an executory limitation.²

Thus, upon a conveyance by feoffment with livery, or under the statute of uses, or upon a devise, "to A. for life, and after his death to such of his children as shall become twenty-one," this creates a valid contingent remainder, which at common law can vest only in such of A.'s children as shall have reached twenty-one at A.'s death. If at that time all of A.'s children are under twenty-one, their estate fails altogether as a remainder at common law; but it cannot be sustained as an executory limitation because during A.'s lifetime it was a valid contingent remainder.³ But if the

¹ 2 Min. Insts. 430; Fearne, Rem. 386, note (6), 382, note (a), 10 et seq., note (h).

² 2 Min. Insts. 431; Fearne, Rem. 385, note (b); *Purefoy v. Rogers*, 3 Saund. 388, note.

³ *Festing v. Allen*, 12 M. & W. 279; *Rhodes v. Whitehead*, 2 Drew & S. 532.

original limitation were to A. for life, remainder to such of A.'s children as become twenty-one after A.'s death, this could never be good as a remainder, because of the certainty of an interval or a gap between the particular estate and the remainder,⁴ and hence, if the limitation is contained in a will or in a deed operating under the statute of uses, it might take effect as an executory limitation.⁵

So, upon a devise "to A. for life, remainder to B. in fee, if he survives C.", the limitation to B. is a contingent remainder at its creation, which would fail at common law if B. dies before C., and once good as a remainder it could not be sustained as an executory limitation. But if the original limitation were "to A. for life, and after one year from A.'s death to B. in fee, if he survives C.", B.'s estate could never take effect as a remainder because of the interval, and hence could be sustained as an executory limitation.⁶

So, if the particular estate, intended to precede the remainder, should be insufficient for the purpose or should fail to take effect at all, so that the ulterior limitation could never take effect as a remainder because of the total absence or insufficiency of the preceding estate to support it, the limitation may be sustained as an executory limitation, having never been valid as a remainder. Hence, upon a devise of a contingent remainder of freehold, preceded by an estate for years, as to A. for ten years remainder to the heirs of B., since the latter estate, under the rule of the common law demanding that a contingent remainder of freehold shall be preceded by an estate of freehold,⁷ cannot be a valid remainder, it may take effect as an executory limitation.⁸

So, also, if the limitation is by will, and the particular tenant dies before the testator, so that his estate lapses and never takes effect, the subsequent limitation could never be good as a remainder, and therefore may be upheld as an executory limitation.⁹ Thus, upon a devise to B. for life, remainder to the first and other sons of B. successively in tail, remainder to the future sons of C. successively for life—where B. died without issue before the testator, and at the testator's death C. had no sons, but some were born later—the limitations to C.'s sons, which were originally intended to take effect as remainders, but failed to do so because of B.'s death before the testator without issue, were supported as executory limitations.¹⁰ But if, in the case put, the particular tenant had survived the testator, though only for a day, the limitation to C.'s sons

⁴Ante, § 594.

⁵In *re Lechmere*, 18 Ch. Div. 524.

⁶Ante, § 594.

⁷2 Min. Insts. 447; *Fearne*, Rem. 525, 526; 2 Washburn, Real Prop. 348; *Hopkins v. Hopkins*, Cas. temp. Talbot, 44.

⁷Ante, § 592.

⁸Ante, § 592.

⁹2 Min. Insts. 447.

would have taken effect as a remainder, and could not thenceforward have been sustained as an executory limitation.

§ 675. The Several Classes of Executory Limitations—Enumeration. Executory limitations arising under the statute of uses are frequently designated generically executory or future uses, and those arising under the statute of wills are generally known as executory devises; but they are all executory limitations, and are subject to the same rules.

But there is another classification of executory limitations which is more important from the standpoint of the application of principles. They are to be classified as follows: (1) Springing limitations, that is, freehold estates to commence in futuro, without any, or a sufficient, preceding estate; (2) shifting or conditional limitations, that is, the substitution of a freehold estate vested in one person by an estate in another; and (3) future or executory interests in chattels.

§ 676. 1. Springing Limitations. At common law a freehold estate in land to commence in futuro, without any, or without a sufficient, preceding estate, cannot be created, because, as we have seen, it cannot arise without livery of seisin, which must in its nature take effect immediately, or not at all, and if it should take effect so far as to pass the freehold out of the grantor, the same would be vested in nobody, but would be in abeyance, contrary to the established policy of the common law as to freeholds;¹¹ but in conveyances operating under the statutes of uses and wills, which pass the freehold without livery of seisin, this reason does not apply. The freehold remains in the grantor, or in the devisor's heirs, until the time appointed for it to take effect, and then passes to the grantee or devisee, by the force and effect of the several statutes. The future limitation may be either appointed to arise upon a contingency (e. g., a devise to the heirs of A., who is yet living, or to the unborn son of A.), in which case it is a contingent limitation, or at a period certain (e. g., a grant to A. for life, or in fee, to commence five years from date), in which case it is vested; but in either case, in order to constitute an executory limitation, there must be no, or no sufficient, preceding particular estate to give it effect as a remainder, for the rule admits of no exception, being, indeed, as we have seen, of the essence of the definition, that no estate can be construed to be an executory limitation which is capable of taking effect as a remainder.¹²

¹¹ 2 Min. Insts. 431; 3 Th. Co. Lit. 102, note (G); 2 Bl. Com. 165, 166.

¹² 2 Min. Insts. 431, 432; Fearn, Rem. 395 et seq., note (d), 382, note (a), 394 et seq.; 1 Th. Co. Lit. 646, note (C).

In devises, such limitations are not otherwise known than as executory devises; but when they occur in conveyances operating under the statute of uses, they are called springing uses. However created, they must, if contingent, be so limited as necessarily to take effect, if at all, within the period prescribed, of a life or lives in being and ten months and twenty-one years thereafter.¹³

These springing limitations are either (1) vested, or (2) contingent, depending upon whether they are subject to a condition precedent and whether the beneficiaries are ascertained.

§ 677. 1. Vested Springing Limitations—Construed to be Vested if Possible. In conformity to the rule of construction applicable to estates upon condition, namely, that in case of doubt an instrument will be construed, if possible, as not creating an estate upon condition, especially upon condition precedent,¹⁴ it is a general principle governing springing limitations that they are to be regarded as creating vested, and not contingent, interests, where such a construction is reasonable and practicable; that is, as creating interests vested in right, with only the possession thereunder deferred.¹⁵

Thus the use of such words of futurity as "when," "at," "after," "in the event of," etc., if they refer to an event which must necessarily happen, the time of its occurrence alone being unascertained, are not generally construed as creating conditions precedent to the vesting of the estate in right, but only as marking the time when the enjoyment of the possession is to commence.¹⁶

Upon this principle a devise "after" the payment of debts or legacies gives the devisee a vested estate, subject merely to a charge created for such debts or legacies, and does not postpone the vesting.¹⁷

¹³ 2 Min. Insts. 432; Fearne, Rem. 382, note (a), 373, 392; 2 Bl. Com. 172, 173, 434, note (51); Gilbert, Uses, 78, Sugden's note (5).

¹⁴ Ante, § 469.

¹⁵ 1 Tiffany, Real Prop. § 141; McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; Young v. Kinkead, 101 Ky. 252, 40 S. W. 776; Van Brunt v. Van Brunt, 111 N. Y. 178, 19 N. E. 60; Dulany v. Middleton, 72 Md. 67, 19 Atl. 146; Hawkins v. Bohling, 168 Ill. 214, 48 N. E. 94; Fowler v. Duhme, 143 Ind. 248, 42 N. E. 623; Patton v. Ludington, 103 Wis. 629, 79 N. W. 1073, 74 Am. St. Rep. 910.

¹⁶ Ante, § 601; 2 Min. Insts. 416, 417; Doe v. Moore, 14 East, 601; Doe v. Norvell, 1 M. & S. 334; Edwards v. Hammond, 3 Lev. 132; Bromfield v. Crowder, 1 Bos. & P. (N. R.) 313. In the case of future limitations of chattels, the same doctrine is applied with qualifications. 3 Min. Insts. 592.

But see 1 Jarman, Wills, 762; 1 Tiffany, Real Prop. § 141; Kingman v. Harmon, 131 Ill. 171, 23 N. E. 430.

¹⁷ 1 Tiffany, Real Prop. § 141; 1 Jarman, Wills, 777; Bowling v. Dobyn, 5 Dana (Ky.) 434; Little's Appeal, 117 Pa. 14, 11 Atl. 520; Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351; Neely v. Boyce, 128 Ind. 1, 27 N. E. 169.

So, also, as in the case of remainders,¹⁸ a question of construction may arise upon a devise to the "surviving" children of A., whether the term "surviving" is to be referred to the death of the testator or to some other future event. In such case, if the gift is immediate—that is, if it is intended to take effect in possession immediately upon the testator's death—there is no other time to which it can be referred except that of the testator's death.¹⁹ But, if the possession be postponed to a period later than the testator's death, there is not the same necessity of construction. For example, if the devise be to the surviving children of A. after the death of B., a question may be raised as to whether the devisees intended by the testator are the children of A. who are living at the testator's death (whose possession, however, would be postponed until the death of B.), or whether they are to be such of A.'s children as are living at B.'s death. In the former event, the devisees are ascertained persons, whose estates would be vested in right, but with the possession postponed till B.'s death; in the latter, the devisees could not be ascertained until B.'s death, and would therefore take contingent estates.

§ 678. **Same—Gifts to a Class.** Just as, in the case of a remainder to a class, the remainder is vested if, or as soon as, any members of the class are in existence or answer the description of the class, but is contingent until that time,²⁰ so in the case of springing limitation to a class, such as a devise to the children, brothers, nephews, etc., of A., the possession not being postponed by the terms of the devise beyond the testator's death, the children, etc., who are living at the testator's death are *prima facie* the beneficiaries of the will, to the exclusion of after-born children, etc.²¹ If the possession is in terms postponed to a period subsequent to the testator's death, or, in case of a deed, subsequent to its execution and delivery, each of the children, brothers, nephews, etc., living at the testator's death (or at the execution of the deed) take *prima facie* vested estates, subject to open up and let in children, etc., born thereafter, but prior to the date when possession is to be given.²²

¹⁸Ante, § 600.

¹⁹Armistead v. Hartt, 97 Va. 316, 33 S. E. 616; Crossman v. Field, 119 Mass. 170.

²⁰Ante, § 606.

²¹1 Tiffany, Real Prop. § 142; 2 Jarman, Wills, 1010; Scott v. Harwood, 5 Madd. 332; Merriam v. Simonds, 121 Mass. 198; Downing v. Marshall, 23 N. Y. 373, 80 Am. Dec. 290; Wood v. McGuire, 15 Ga. 202.

²²1 Tiffany, Real Prop. § 142; 2 Jarman, Wills, 1011; Oppenheim v. Henry, 10 Hare, 441; Hall v. Hall, 123 Mass. 120; Hill v. Rockingham Bank, 45 N. H. 270.

§ 679. **2. Contingent Springing Limitations.** A springing limitation is contingent (corresponding to a contingent remainder), whenever it is limited to a person unascertained or not in being or upon the happening of an uncertain event or condition precedent, there being no preceding estate, or no sufficient one, to support it as a contingent remainder. In other words, wherever the limitation, but for the initial absence of a sufficient preceding estate, would be a valid contingent remainder, it will operate as a contingent springing limitation. But if it has ever once taken effect as a remainder, though it subsequently fails as such, it can never thereafter take effect as an executory limitation of any sort.²³

Thus, a limitation to the heirs, heirs of the body, issue, unborn child, etc., of B. (a living person), without a preceding estate of freehold, or with no preceding estate at all, is a contingent springing limitation, as would also be a limitation to B. upon the marriage of A., or a limitation to such of B.'s children as shall attain the age of twenty-one, B. having none of that age at the time of the gift, etc.

In the main, as we shall find in the course of the discussion, quite similar rules are applicable to springing limitations as apply to remainders; the differences between them being not so much differences of construction, as in origin (the one existing at common law, the other only under statutes) and in the requirement of a preceding estate for remainders, but not for springing limitations.

§ 680. **II. Shifting or Conditional Limitations—Their Origin and Nature.** The student will recall that two of the rules governing remainders are (1) that no remainder can be limited after a vested fee simple;²⁴ and (2) that no remainder, which is to take effect in derogation of the preceding estate, is valid, it being essential that the remainder await its regular expiration.²⁵

The common-law principle is that a freehold estate once created can in general be terminated prematurely in advance of the period marked out in its original limitation only by a re-entry of the grantor or his heirs for a condition broken, for as the estate is created by livery of seisin, an equally notorious ceremony was required for its premature termination, and that was found in the re-entry above mentioned. And upon such re-entry the grantor or his heirs was seised, as of his original estate, by title paramount, thus wiping out and destroying, not only the estate terminated, but all ulterior limitations contained in the same grant as well.²⁶ It is for this

²³Ante, § 674.

²⁴Ante, § 595.

²⁵Ante, §§ 592, 650.

²⁶Ante, §§ 474, 481.

reason that a remainder must await the regular expiration of the preceding estate, and cannot take effect in derogation thereof.

But the statutes of uses and wills having dispensed with the necessity of livery to create the freehold, there is no longer the same necessity for the grantor's re-entry to determine it prematurely, and in fact such estates may in modern times be ended prematurely, and, if limited over to another, pass to such persons without any re-entry, by way of shifting or conditional limitation.²⁷

Thus, if a devise were made to A. and his heirs, and in case A. should die under twenty-five (or in case B. should die, leaving no issue at his death, or in case A. should marry W., or any other condition) then to Z. and his heirs, the limitation to Z., while invalid as a remainder, because limited after a vested fee simple, and because it must take effect in derogation of A.'s estate, if it is to take effect at all, is valid as a conditional limitation, and would give Z. the fee, of which A.'s death under twenty-five (or marriage, etc.) had divested A.²⁸

So, if the devise were to A. for life, and should a named event happen (such as A.'s marriage to W.) then at once to B. in fee, B.'s estate could not take effect as a remainder, because it would be in derogation of A.'s estate; but it would be sustained as an executory limitation of the second class, that is, as a shifting or conditional limitation.²⁹ But if the words "at once" were omitted, it would be construed as intended to be limited to await the regular expiration of A.'s estate, and thus might take effect as a remainder. In other words, A.'s marriage to W. or other event would not be construed as a condition subsequent attached to A.'s estate, but merely as a condition precedent attached to B.'s.³⁰

§ 681. Same—Shifting or Conditional Limitations Always Contingent. Since shifting limitations arise, not upon the regular termination of the preceding estate, but after it has been prematurely divested upon a contingency or condition subsequent, they must necessarily be always contingent. But the preceding estate may itself be either a present estate in possession, a vested or contingent remainder, or a vested or contingent executory limitation, either springing or shifting.

Thus, upon a conveyance or devise "to A. in fee, but if A. die under thirty then to B. in fee," A.'s estate is vested in possession, and the shifting or conditional limitation to B. is contingent upon A.'s

²⁷ 2 Min. Insts. 432; 2 Th. Co. Lit. 87, note (L, 2), 768, Butler's Note II.

²⁸ 2 Min. Insts. 433; 2 Bl. Com. 173, 174; Fearn, Rem. 399 et seq., note (d); Pells v. Brown, Cro. (Jac.) 540; Gulliver v. Wicket, 1 Wils. 105.

²⁹ Ante, § 592.

³⁰ Ante, §§ 470, 594.

dying under thirty. And so it would be if the devise were "to X. for life, remainder after X.'s death to A. in fee, but if A. die under thirty then to B. in fee," or "to A. in fee after the death of X., but if A. die under thirty then to B. in fee" (in the first case A. taking a vested remainder, and in the second a vested springing limitation). So, upon a devise "to C.'s eldest son (unborn) in fee, but if he die under thirty to B. in fee," the preceding estate is a contingent springing limitation, and if it were preceded by a freehold particular estate, would be a contingent remainder. But in all of these cases equally the limitation to B. is contingent upon the death under thirty of the tenant of the preceding estate.³¹

§ 682. III. Future Interests in Chattels. A gift of a term for years, or any other chattel, after a previous disposition thereof for life, or indeed for any time, was originally held void, because it was thought that, being by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade, moreover, requiring a free circulation thereof, it would tend to quarrels and strife, and to obstruct the freedom of commerce, if such limitations in remainder were generally tolerated and allowed. But yet, in process of time, in last wills, such limitations of chattels in remainder, even after a life estate therein, were permitted, though originally that indulgence was shown only when the use merely of the chattels, and not the chattels themselves, was given to the first taker; the property being supposed to continue all the time in the executor of the testator. That distinction, however, as also the distinction between such limitations by will and by deed, has long been disregarded, and remainders, both by deed and by will, have for more than a hundred years past been as freely allowed in case of terms for years, and of other chattels, as in case of freehold estates in lands, with two qualifications only, namely: First, that the things given shall not be such as are consumed in the use (in which case the first taker becomes the absolute owner of the subject); and secondly, that even in England, and much more with us, an estate tail to the first taker carries with it the fee simple.³²

Having reference to the foregoing explanation, the limitations in futuro of terms for years, or other chattels, can hardly be classed with propriety, in modern times, amongst executory limitations—

³¹ Post, § 691; 1 Tiffany, Real Prop. § 147; Hall v. Warren, 9 H. L. Cas. 420; Burbank v. Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312; Perkins v. Fisher, 8 C. C. A. 270, 59 Fed. 801.

³² 2 Min. Insts. 433, 434; 2 Bl. Com. 398, 174; 2 Kent, Com. 352; 2 Th. Co. Lit. 646, note (C); Fearne, Rem. 402 et seq.; Dunbar v. Woodcock, 10 Leigh (Va.) 628.

not when they are merely remainders, since as remainders they are equally good by deed as by will; nor when they want the attributes of remainders, for they do not owe their validity and effect to either of the statutes which give rise to executory limitations, nor to any statute whatsoever, but simply to the principles of the common law. Thus, if the owner of a term for one hundred years, or of a horse, gives the same, whether by deed or will, to A. for life, and afterwards to Z., the limitation to Z., according to the modern view of the common law, is a vested remainder in fee, governed by rules closely analogous to those which control remainders in case of freehold estates in lands. And so, also, if the owner of a term for one hundred years, or of a horse, gives it by deed or will to A., to take effect five years hence, or to A. in fee, and if he should leave no issue living at his death to Z. in fee, there is no occasion to invoke anything but the common law, nor, indeed, is there anything else to invoke, in order to give full effect to the limitations. There being no livery of seisin required in the transfer of chattels, and no similar notoriety to determine any interest in them, A.'s future limitation, in the first instance, may spring up at the appointed time, and Z.'s shift from A. to himself, upon the appointed contingency, without the aid of any statute, just as in freehold estates may be the case by the force and effect of the statutes of uses and of wills.

-Such limitations of chattels, however, are for the most part, controlled by the same rules which govern executory limitations proper, and, without inconvenience, may be called by the same name, noting the few differences which exist, as they occur.³³

One of the most prominent differences between future limitations of chattels (which, however, applies only to chattels personal), and of freehold estates in lands, relates to the consumability of the subject. The doctrine seems to be that gifts for life of things consumed in the use, such as provisions needed for subsistence during the current year, admit of no subsequent limitation, but vest the absolute property in the donee; but that, as to other subjects of personalty, not consumed in the use, a limitation, even after a life estate, is allowable, with a varying degree of responsibility in the life tenant, or his representatives, for the forthcoming and condition of the several articles, according to their character. Thus, as to things which are intended for use, and are not reproductive, such as agricultural implements and work cattle, the life tenant's estate is answerable only for the forthcoming of such of them as were in existence at the life tenant's death, in the state in which they then were, although worn and impaired, supposing such deterioration or

³³ 2 Min. Insts. 434.

destruction not to have been brought about by his default; commodities adapted to reproduction, such as brood mares, flocks of sheep, and the like, the tenant for life is bound to keep up in kind, and his estate is accountable for them accordingly, unless destroyed or impaired by casualty; and money, whether given directly, or the proceeds of chattels which either were sold, or in the ordinary course of business were subjects of sale, the life tenant's estate must account for as of his death.³⁴

§ 683. **Differences between Executory Limitations and Remainders—Enumeration.** It must be remembered that an estate is never to be construed to take effect as an executory limitation, if it has ever taken effect as a common law remainder, either vested or contingent; for which, also, there are reasons of policy, which a close study of the differences presently to be mentioned will disclose.³⁵

In order to understand the differences between executory limitations and remainders we must have regard to (1) the necessity for the existence of a preceding particular estate; (2) the proper subject of executory limitations and of remainders, respectively; (3) the modes of creating them, respectively; (4) the difference between them in respect to the liability to be barred or destroyed; (5) the difference in respect to liability to dower and curtesy, respectively; and (6) the applicability to them, respectively, of the rule in Shelley's Case.³⁶

§ 684. **Same—I. Necessity for Preceding Particular Estate.** In an executory limitation no preceding estate is needed. The estate, though a freehold (since no livery of seisin is required), may spring up at any future period not too remote, or may shift from one to another. And, if there be a preceding estate, it is not necessary that the executory limitation should vest when such preceding estate determines. To a remainder, on the other hand, a preceding estate is by the definition thereof indispensable, and its determination before the remainder is ready to vest, or its taking effect in derogation thereof, is, at common law, fatal thereto.³⁷

³⁴ 2 Min. Insts. 434, 435; *Dunbar v. Woodcock*, 10 Leigh (Va.) 628, 653; *Randall v. Russell*, 3 Meriv. 194. But see *Madden v. Madden*, 2 Leigh (Va.) 377, 389, 392.

³⁵ Ante, § 674; 2 Min. Insts. 435; *Fearne, Rem.* 393, 394; *Purefoy v. Rogers*, 3 Saund. 388, note; *Doe v. Morgan*, 3 T. R. 763; *Goodtitle v. Billington*, 2 Dougl. 758.

³⁶ 2 Min. Insts. 435.

³⁷ Ante, § 592; 2 Min. Insts. 436; *Fearne, Rem.* 399 et seq., note (d), 382, note (a), 416, note (a), 418; 2 Washburn, *Real Prop.* 356. If the remainder is vested, the termination of the particular estate before the remainder falls in does not, even at common law, affect the remainder. Ante, § 722.

§ 685. **Same—II. Proper Subjects of Executory Limitations and Remainders, Respectively.** Executory limitations relate to both real and personal property, and are governed by the same general rules, whatever the subject, while remainders originally existed in lands only. But this difference has in modern times virtually ceased to exist, remainders being allowed in chattels with scarcely less freedom than in freehold estates in lands.³⁸

§ 686. **Same—III. Modes of Their Creation, Respective'y.** Executory limitations of freehold estates in lands can be created only by conveyances operating under the statutes of uses and of wills, whereby livery of seisin is dispensed with, and not by conveyances operating at common law. Remainders may be created by either class of conveyance.³⁹

§ 687. **Same—IV. In Respect of Their Liability to be Barred or Destroyed.** Executory limitations are incapable of being barred by the alienation, or any other act, or by any omission, of the persons seised of the preceding estate, because the title of the executory devisee or grantee is not through, or as privy to the immediate taker, but quite independent of him; nor are such executory limitations affected by a recovery suffered by the first taker, because the supposed recompense, which is the principal ground for the operative effect of a recovery, cannot consistently be presumed to extend to the future devisee or grantee, whose title is independent of such first taker's; nor are they liable to merger when the defeasible estates and the future limitation become vested in the same person. Contingent remainders, on the other hand, may be destroyed at common law by fine or recovery, by merger of the particular estate, or by any displacement thereof. And this is stated to be in England the great and essential difference.⁴⁰

§ 688. **Same—V. In Respect of Their Liability to Dower and Curtesy.** In the case of conditional limitations, under certain circumstances, the preceding estate, supposing it to be an inheritance, is liable to dower and curtesy, which are not defeated by its actual determination.⁴¹ But no remainder, whether contingent or vested, if it comes after a freehold, admits of dower or curtesy. Nor can there be dower or curtesy in the future limitation, for a like reason. Nor, of course, in case of a remainder, does the preceding particular

³⁸ 2 Min. Insts. 433, 436; 2 Bl. Com. 398, 174, 175; Fearne, Rem. 5, note (c), 401, note (e), 416, note (a), 418.

³⁹ 2 Min. Insts. 430, 431; Fearne, Rem. 416, note (a).

⁴⁰ 2 Min. Insts. 436, 437; Fearne, Rem. 416, note (a), 418; Hargrave, Law Tracts, 518; 2 Washburn, Real Prop. 356.

⁴¹ Ante, §§ 233, 256.

estate admit of dower or curtesy, for that with us, since the abolition of estates tail, can never be an estate of inheritance.⁴²

§ 689. **Same—VI. Applicability of Rule in Shelley's Case.** The rule in Shelley's Case is not applicable to executory limitations, as we have seen that it is at common law, in case of nominal contingent remainders, apparently because the limitation to the ancestor and the heirs are not parts of the same estate, but are distinct and independent dispositions of the subject.⁴³

§ 690. **Effect of Failure of Preceding Estate—Executory Limitation Accelerated.** Where there is a conditional limitation, to take effect in derogation of a preceding estate upon the occurrence of some contingent event, if, for any reason not connected with that contingency, the preceding estate never takes effect, as where the first taker dies before the testator (in which case the devise to him lapses and is void at common law), or where the first taker never comes into existence, the general rule is that the ulterior limitation, if limited to an ascertained person, is accelerated and takes effect at once.⁴⁴

Thus, where one devises land to the child of which his wife is (supposed to be) then enceinte, and if such child die under twenty-one then over, the wife as a matter of fact not being pregnant, the devise over will take effect immediately upon the testator's death.⁴⁵ And so, if for any reason the preceding estate is void, the limitation over will take effect immediately.⁴⁶

But, while such is the general rule, an exception thereto must be noted where the circumstances of the failure of the first estate are such as would have excluded the second taker altogether, had the first estate taken effect.⁴⁷ Thus, upon a devise "to A. in fee, but if he die under twenty-five to B. in fee," if A. never comes into existence, or if he has died under twenty-five and before the testator, the limitation to B. is accelerated. But if he should die

⁴² 2 Min. Insts. 437; 2 Washburn, Real Prop. 374; Cocke v. Phillips, 12 Leigh (Va.) 248.

⁴³ Ante, § 609 et seq.; 2 Min. Insts. 437; Fearne, Rem. 276.

⁴⁴ 1 Tiffany, Real Prop. § 147; Fearne, Rem. 237, 509; 2 Jarman, Wills 1642 et seq.; Avelyn v. Ward, 1 Ves. Sr. 420; Robison v. Female Orphan Asylum, 123 U. S. 702, 8 Sup. Ct. 327, 31 L. Ed. 293; Perkins v. Fisher, 8 C. C. A. 270, 59 Fed. 801; In re Miller's Will, 161 N. Y. 71, 55 N. E. 385; Mathis v. Hammond, 6 Rich. Eq. (S. C.) 121.

⁴⁵ 2 Min. Insts. 433; 1 Tiffany, Real Prop. § 147; Jones v. Westcomb, 1 Eq. Cas. Abr. 245, pl. 10; Frogmorton v. Holyday, 3 Burr. 1618.

⁴⁶ 1 Tiffany, Real Prop. § 147; Hall v. Warren, 9 H. L. Cas. 420; Burbank v. Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312; Perkins v. Fisher, 8 C. C. A. 270, 59 Fed. 801.

⁴⁷ 1 Tiffany, Real Prop. § 147; Tarbuck v. Tarbuck, 4 L. J. Ch. 129; Doe

before the testator, but after having reached twenty-five, the devise over to B. can never take effect.⁴⁸

§ 691. **Effect of Failure or Regular Expiration of Ulterior Limitation.** It is a general rule governing conditional limitations that where a valid disposition of property is followed by a limitation over, which from some cause fails to take effect, that fact does not invalidate the previous disposition.⁴⁹

On the contrary, if the beneficiary of the ulterior limitation should never come into existence, or the ulterior limitation is void for remoteness, or otherwise is, or becomes, void, upon the happening of the designated contingency, since the estate cannot upon that event go, as directed, to the second taker, a grave question arises whether the estate shall remain in the first taker, notwithstanding the occurrence of the event which was designed to determine it, or whether, his estate terminating, the property should return to the grantor or the testator's heirs.

In other words, the question at issue is whether the contingency designated is intended by the grantor or testator to operate primarily as a condition precedent to the vesting of the ulterior limitation, or as a condition subsequent attached to the preceding estate.

In England the general rule seems to be to regard it as the intention to make the condition operate primarily as a condition subsequent, terminating the preceding estate, even though the limitation over cannot take effect, except where the ulterior limitation is void for remoteness, as violating the rule against perpetuities, in which case the preceding estate continues to exist, despite the occurrence of the event upon which it was to have gone over, for independent reasons considered later.⁵⁰

But in the United States generally the opposite view is taken, and the condition is regarded as a condition precedent to the vesting of the ulterior limitation rather than as a condition subsequent to

v. Brabant, 4 T. R. 706; Lomas v. Wright, 2 My. & K. 769; McGreevy v. McGrath, 152 Mass. 24, 25 N. E. 29; Mathis v. Hammond, 6 Rich. Eq. (S. C.) 127.

⁴⁸ Doe v. Brabant, 4 T. R. 706; Williams v. Chitty, 3 Ves. 549; 1 Tiffany, Real Prop. § 147, note 268.

⁴⁹ Gore v. Gore, 2 P. Wms. 28; Loyd v. Loyd, 102 Va. 527, 46 S. E. 687; Goldsborough v. Martin, 41 Md. 488; Heald v. Heald, 56 Md. 300; Lawrence's Estate, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925; Saxton v. Webber, 83 Wis. 617, 53 N. W. 905, 20 L. R. A. 509.

⁵⁰ 1 Tiffany, Real Prop. § 148; Sugden, Powers (3d Ed.) 513; Doe v. Eyre, 5 C. B. 713; Robinson v. Wood, 27 L. J. Ch. 726; Hurst v. Hurst, 21 Ch. Div. 278. See 20 Am. & Eng. Ency. Law (1st Ed.) 947, note.

the estate of the first taker, and hence the preceding estate is not terminated, but continues in the first taker according to the original limitation, unless a contrary intention clearly appear on the face of the instrument.⁵¹

Upon the same principle, namely, that the grantor's or testator's intention is to regard the contingency as a condition precedent to the ulterior limitation rather than a condition subsequent to the prior limitation, it is held, even in England, that the happening of the event defeats the prior limitation only to the extent necessary to permit the ulterior limitation to vest. Thus, upon a devise to A. in fee, but if B. marry C. then to B. for life, and B. marries C., while A.'s estate is defeated to the extent necessary to give B. an estate for his life, upon his death the land will return to A. or his heirs, and not to the heirs of the testator.⁵²

§ 692. Alternative Limitations. Alternative limitations are closely analogous to alternative remainders, already discussed.⁵³ They consist of executory limitations, made in the alternative, so that if the contingency upon which the first is to take effect does not happen, so as to vest the first estate, the second and alternative limitation may take effect and vest in its place, while, if the first vests, the second is of no effect.⁵⁴

In the nature of things, both the limitations must be contingent until the event happens that is to determine which of them shall vest. Both the limitations may be springing, or both may be conditional or shifting, limitations; but they are contingent until one vests, whereupon the other is destroyed.

Thus, upon a devise "to the eldest son (unborn) of A. in fee, but if A. have no son to B. in fee at A.'s death," the limitation to B., as well as that to A.'s son, is a springing limitation. On the other hand, upon a devise "to A. in fee, but if A. dies leaving issue at his death then to such issue, if he dies leaving no issue at his death then to B. in fee," the limitations to A.'s issue and to B. are

⁵¹ 1 Tiffany, Real Prop. § 148; Gray, Perpet. § 250; Medley v. Medley, 81 Va. 265; Drummond v. Drummond, 26 N. J. Eq. 234; Groves v. Cox, 40 N. J. Law, 40; North Adams Universalist Soc. v. Boland, 155 Mass. 171; Merriam v. Simonds, 121 Mass. 198; Shadden v. Hembree, 17 Or. 14, 18 Pac. 572. But see Leonard v. Burr, 18 N. Y. 96.

⁵² 1 Tiffany, Real Prop. § 148; Gatenby v. Morgan, 1 Q. B. Div. 685; Jackson v. Noble, 2 Keen, 590; Thomae v. Thomae (N. J.) 18 Atl. 355. See 2 Washburn, Real Prop. 346. Contra, Doe ex dem. Harrington v. Roe, 1 Houst. (Del.) 398.

⁵³ Ante, § 639.

⁵⁴ 1 Tiffany, Real Prop. § 144; Fearne, Rem. 508, 514; Stephens v. Stephens, Cas. temp. Talbot, 228.

alternative limitations, but both are shifting or conditional limitations.⁵⁵

It may also be noted in this connection that there may be a limitation over to a person, which will in one event operate as an alternative remainder, and in another event as an executory limitation. Thus, upon a devise "to A. for life, remainder to his issue, and if he have no issue, or if, in case he has issue, such issue should die under twenty-one, then over to B.," B. has an alternative contingent remainder after A.'s life estate so long as A. has no issue; but as soon as A. has issue the remainder to such issue vests, and the alternative remainder to B., contingent upon A.'s having no issue, fails altogether. But immediately upon the birth of A.'s issue B. acquires an entirely new estate by way of conditional (though not alternative) limitation, dependent upon the death under twenty-one of the issue, in whom the estate is now vested.⁵⁶

§ 693. **Cross Limitations.** The principles governing cross limitations may be gathered in the main from the analogous principles applicable to cross remainders, already considered.⁵⁷ If, after an estate has been limited in fee simple to two or more persons, it is provided that upon the happening of a certain event, or certain events, as upon the death of one or more of them without living issue, the share of the deceased shall pass to the other or others, the ulterior limitations cannot take effect as cross remainders, because the preceding estate is a fee simple, but are valid as cross limitations.⁵⁸

But, as has been explained in connection with cross remainders, there is no necessity, even in a will, to imply cross limitations, since such an implication is never necessary in order to avoid an intestacy, as it sometimes is in case of cross remainders, and if permitted would result in divesting upon conjecture merely estates in fee simple already vested.⁵⁹ Thus, upon a limitation "to A., B. and C. in fee, and if they (all) die without issue to Z. in fee," upon the death of A. without issue, his share would descend to his heirs, until B. and C. also die without issue, in which event Z. would take. There is no need, upon A.'s death without issue, to imply a cross limitation over to B. and C.⁶⁰

⁵⁵ See 1 Tiffany, Real Prop. § 144, note 255.

⁵⁶ Doe v. Selby, 2 B. & Cr. 926; 1 Tiffany, Real Prop. § 144, note 256.

⁵⁷ Ante, § 640, et seq.

⁵⁸ Ante, § 595; 1 Tiffany, Real Prop. § 145; 2 Jarman, Wills, 43. See Anderson v. Brown, 84 Md. 261, 35 Atl. 937.

⁵⁹ Ante, § 642 et seq.; 2 Min. Insts. 1077, 1078.

⁶⁰ Ante, § 643.

§ 694. **The Rule against Perpetuities—Necessity for the Rule.** The necessity for the application of some such rule as this to executory limitations, and indeed to all executory contingent interests, was observed when, upon the development of these new classes of future interests, it was found that, not being subject to the checks and trammels imposed by the common law upon remainders, it might be easy to pile one contingent limitation upon another in indefinite succession, and thus for indefinite periods arrest the alienation of lands and still more disastrously of chattels—a practice which might be of even more signal prejudice to the well-being of society than the statute of entails had been prior to Taltarum's Case.⁶¹

Suppose, for example, a testator to devise his land to the eldest son of the eldest son of the testator's eldest son. In the absence of a rule such as the rule against perpetuities, land might be tied up, as in this case, so as to be incapable of substantial use and enjoyment by any one for generations, until the particular devisee designated by the testator, however remote, should come into existence; and although, in the meantime, the estate would vest in the testator's heirs, pending the arrival of such devisee, or other remote contingency, they would possess a defective title, and would be unable to aliene the land save within the limits of the contingency to which it is subject and for a totally inadequate price.

The same result might follow upon a devise of an indefinite succession of shifting limitations, as upon a devise to A. in fee, and upon a total failure of A.'s heirs at any future time to B. in fee, and upon a like failure of B.'s heirs to C. in fee, and so on down the alphabet. Any prospective purchaser of the land from A. or his heirs would stand confronted with the possibility that A.'s heirs would at some time be exhausted, in which event B. would be entitled to the land by title paramount to that of such purchaser. He would therefore either decline to purchase at all, or buy as a speculation, paying only a proportion of the true value.

The result of such limitations, if permitted without check or restraint, would be a tendency to tie up property and remove it for indefinite periods out of the channels of trade and commerce, to the great detriment of society.

§ 695. **Same—The Precise Terms of the Rule.** The considerations presented in the preceding section have induced the courts to establish the principle that, though such future interests may be limited to as many persons successively as the grantor or testator may think proper, yet they must all be in esse during the life of

⁶¹Ante, §§ 176, 614, et seq.; 2 Min. Insts. 93, 271, 437.

the taker of the first estate; for then, as it was said, the candles are all lighted and consuming together, and the ultimate limitation is in reality only to that person who happens to survive the rest. More recently, this period has been somewhat prolonged by the addition thereto of the period of gestation and twenty-one years (the age at which one thus born after the termination of the lives in being might first validly aliene the property).

Hence the canon established upon this subject, as it exists in modern times, is that every contingent executory limitation, in order to be valid, shall be so limited that it must necessarily vest in interest, if at all, within a life or lives in being, ten months and twenty-one years thereafter; the period of gestation being allowed only in those cases where it is actually a factor.⁶²

§ 696. Same—The Period Prescribed by the Rule against Perpetuities. The precise period which has, after, some fluctuations but all looking to the same principle, been finally established is contained in the rule as stated in the last section, namely, that every contingent executory limitation, whether springing or shifting, whether of real or personal property, is void if it be not so limited that it must necessarily vest, if at all, within life or lives in being, ten months and twenty-one years thereafter, including the ten months in the estimate only where gestation is actually an element.⁶³

But if the time during which the contingent limitation is not to vest is not measured by lives at all, but merely by a definite or indefinite number of years, it is then necessary that the designated period for the vesting should not be postponed beyond twenty-one years, all reference to lives in being and the period of gestation being stricken from the rule in such case.⁶⁴

§ 697. Same—Meaning of “Life or Lives in Being.” The “lives in being,” which in part constitute the period during which a limi-

⁶² 2 Min. Insts. 437, 438; 2 Bl. Com. 174, note (21); Fearne, Rem. 429, note (f), 444, note (a); 2 Washburn, Real Prop. 357 et seq.; 1 Jarman, Wills, 250 et seq.; Long v. Blackall, 7 T. R. 100; Cadell v. Palmer, 10 Bing. 140, 1 Cl. & F. 372; Loyd v. Loyd, 102 Va. 527, 46 S. E. 687; Frazier v. Frazier, 2 Leigh (Va.) 642.

⁶³ 2 Min. Insts. 271, 438; 2 Washburn, Real Prop. 357; 2 Bl. Com. 174, note (21); 2 Th. Co. Lit. 578, note (A); Howard v. Duke of Norfolk, 2 Swanst. 454; Cadell v. Palmer, 10 Bing. 140, 1 Cl. & F. 372; Long v. Blackall, 7 T. R. 100; Loyd v. Loyd, 102 Va. 527, 46 S. E. 687; Frazier v. Frazier, 2 Leigh (Va.) 642. See, also, Lawrence's Estate, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925, note; Barnum v. Barnum, 26 Md. 119, 90 Am. Dec. 101, note.

⁶⁴ 1 Tiffany, Real Prop. § 154; Palmer v. Halford, 4 Russ. 403; Rolfe & Rumford Asylum v. Lefebvre, 69 N. H. 238, 45 Atl. 1087.

tation may remain contingent, may be indefinite in number, provided "the candles are all lighted and consuming together," and provided, further, that it is possible to ascertain as a fact the termination of the life of the last survivor of those whose lives are being counted in the estimate, so that it may be definitely determined when the period of twenty-one years thereafter is to commence.⁶⁵ Nor need the persons whose lives are being counted have any connection whatever with the property disposed of; that is, they need take no estate or interest therein, nor need they be relatives of the beneficiaries.⁶⁶

A life is "in being," within the rule, even though the person be not yet born, if he be en ventre sa mère at the date of the creation of the interest, as in the case of a limitation to the child of the testator's posthumous son; such son being regarded as in being at the date of the creation of the interest, that is, at the testator's death. Here the period of gestation is prefixed to the life, so as to constitute it in its entirety a life in being.⁶⁷

But the period of gestation, instead of being prefixed to the life to make it a life in being, may by the terms of the rule be added at the end of the life in being, where the circumstances call for it. Thus, upon a limitation to a grandson (unborn) of the testator who shall attain twenty-one years, the life of the testator's son is the life in being, and upon the latter's death his son may be en ventre sa mère. The limitation is valid, because if it vests at all it must necessarily vest within a life in being (the testator's son), ten months (the grandson en ventre sa mère) and twenty-one years thereafter.⁶⁸

Hence it may in particular instances become necessary to estimate in the measurement of the time two periods of gestation—one at the beginning of the life in being and the other at the end thereof. Thus a devise to the testator's grandchildren who attain the age of twenty-one is not too remote, though the only grandchild who attains such age is a posthumous son of a posthumous son of the testator.⁶⁹

§ 698. Same—Mere Improbability that Limitation will Take Effect beyond the Period Prescribed Immaterial. The requirement

⁶⁵ 2 Min. Insts. 438; 1 Tiffany, Real Prop. § 154.

⁶⁶ 1 Tiffany, Real Prop. § 154; Thellusson v. Woodford, 11 Ves. 112; Cadell v. Palmer, 1 Cl. & F. 372. See Scatterwood v. Edge, 1 Salk. 229; Low v. Burron, 3 P. Wms. 262.

⁶⁷ Long v. Blackall, 7 T. R. 100; Thellusson v. Woodford, 11 Ves. 112.

⁶⁸ Cadell v. Palmer, 1 Cl. & F. 372.

⁶⁹ 1 Tiffany, Real Prop. § 154; Gray, Perpet. § 221; Thellusson v. Woodford, 11 Ves. 112.

that the contingent executory interest must necessarily vest in right, if it vests at all, within the period prescribed by the rule, is an absolute requirement, and knows no exception. The mere improbability that the vesting will occur after that period, how great soever that improbability may appear, will not make the limitation good. The rule against perpetuities requires that it be legally impossible that the event upon which the future limitation is to vest in interest be postponed beyond life or lives in being, and ten months and twenty-one years.⁷⁰

Thus a devise or conveyance to such children of a living person as may be living at a time too remote under the rule is void, though the age of the living person be such (say eighty years) as to render it practically (though not legally) impossible that children should be born to him or her, other than those already living.⁷¹

On the other hand, the possibility that the limitation will never vest does not prevent it from being a valid disposition under the rule, provided that, if it vests at all, it must vest within the prescribed period; and where there are several of such limitations, the fact that some of them may never vest will not in general affect the validity of those that do vest.⁷²

§ 699. Same—Rule Applies Only to Contingent Interests. It is to be especially observed that the rule against perpetuities is not aimed against a long deferred vesting of the possession, but against the indefinite postponement of the vesting in right; it being the latter, rather than the former, that materially interferes with the alienability of the property. The rule therefore applies only to contingent interests; that is, interests either limited to persons not ascertained or not in being, or limited upon the occurrence of an uncertain event (a condition precedent).⁷³ Hence the rule has no application where the limitation must take effect, if at all, immediately

⁷⁰ Gray, Perpet. § 214; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259.

⁷¹ 1 *Tiffany*, Real Prop. § 154; Gray, Perpet. §§ 215, 215a; *Jee v. Audley*, 1 Cox, 324.

⁷² Ante, § 839; *Loyd v. Loyd*, 102 Va. 527, 46 S. E. 687; *Lawrence's Estate*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925; *Heald v. Heald*, 56 Md. 300; *Goldsborough v. Martin*, 41 Md. 488; *Saxton v. Webber*, 83 Wis. 617, 53 N. W. 905, 20 L. R. A. 509; *Gore v. Gore*, 2 P. Wms. 28.

⁷³ Gray, Perpet. § 205 et seq.; *Loyd v. Loyd*, 102 Va. 528, 46 S. E. 687; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 82 Fed. 124; *Howe v. Morse*, 174 Mass. 491, 55 N. E. 213; *Johnston's Estate*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621; *Stout v. Stout*, 44 N. J. Eq. 479, 15 Atl. 843; *Pulitzer v. Livingston*, 89 Me. 359, 36 Atl. 635; *Owsley v. Harrison*, 190 Ill. 235, 60 N. E. 89; *Phillips v. Harrow*, 93 Iowa, 92, 61 N. W. 434.

upon the death of life tenants in whom the previous estate is vested.⁷⁴

And the fact that the right to the possession or enjoyment of a vested interest is deferred to a remote period does not bring it within the operation of the rule. Hence it is that a vested remainder after an estate tail or after a lease for 999 years is valid;⁷⁵ and so it is in case of a vested springing limitation to arise after a remote period.

§ 700. **Same—Considerations Leading to the Adoption of the Particular Period Prescribed by the Rule.** This particular period was adapted by analogy to the utmost period during which, at common law, land could be kept inalienable by way of remainder. Thus, in marriage settlements (where the effort is to preserve the estate as long as possible within the limits of one or two families), the estate may be limited to H. and W. during their joint lives, remainder to the survivor for life, remainder to the first and other sons of the marriage successively in tail, remainder to the daughters in tail, remainder in fee to H.'s right heirs, and until the first person to whom a remainder in tail is limited comes of age, the land is incapable of being aliened in fee simple. And as that person may, at the death of H., be en ventre sa mere, the time in such case would be prolonged for the term of gestation, making the utmost period of inalienability of the inheritance at common law one or more lives in being, the limit of gestation, and twenty-one years afterwards, which has, therefore, for more than two centuries constituted the "rule against perpetuities" in respect to lands, and a fortiori as to chattels.⁷⁶

§ 701. **Same—The Time from Which the Period is to be Estimated.** The rule is to be applied—that is, the measurement of the period prescribed by the rule is to commence—as of the time when the future contingent interest is created. In the case of a deed, this would be the date of the delivery of the deed; and in case of a will, the date of the testator's death.

If the limitation, as measured by the rule, is then too remote, no subsequent change of circumstances, by which it would thenceforth

⁷⁴ *Loyd v. Loyd*, 102 Va. 528, 46 S. E. 687.

⁷⁵ 1 *Tiffany*, Real Prop. § 155; *Gray*, Perpet. § 205 et seq.; *Seaver v. Fitzgerald*, 141 Mass. 401, 6 N. E. 73; *Loring v. Blake*, 98 Mass. 253; *Siddall's Estate*, 180 Pa. 127, 36 Atl. 570; *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625; *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356.

⁷⁶ 2 *Min. Insts.* 438, 439; 2 *Bl. Com.* 174, note (21); *Fearne*, Rem. 444, note (a); *Howard v. Duke of Norfolk*, 2 *Swanst.* 454; *Long v. Blackall*, 7 *T. R.* 101; *Pleasants v. Pleasants*, 2 *Call (Va.)* 319, 336.

become impossible that the limitation should vest later than a life or lives in being and ten months and twenty-one years thereafter, will render the limitation valid. It is either valid for all time or void for all time from the moment of its creation.⁷⁷

Thus, a limitation to D. in fee, after a total failure of the heirs male of C.'s body, is void for remoteness, since the failure of C.'s heirs male, viewed at the time of the creation of the estate, may be postponed for indefinite generations, and though, as a matter of fact, it subsequently transpires that C. never has any heirs of the body, this will not make good the limitation to D., which was too remote at its creation.⁷⁸

So, also, in a will, the state of affairs, as they appear to the testator at the time of the execution of the will, plays no part in the application of the rule against perpetuities, but only the condition of affairs existing at the testator's death, at which time the limitations under the will are first created.⁷⁹ Hence, in case of a devise "after A.'s death to such children of his as attain the age of twenty-five," the limitation on its face is void for remoteness, since a child not yet in being might be the only one to reach twenty-five, and he might not do so within a life in being (A.'s life), ten months and twenty-one years thereafter. Yet, before the testator's death, the circumstances may be so altered, as by the death of A., that if the limitation be viewed (as it must be) as at the time of the testator's death it must necessarily vest, if at all, within the period prescribed by the rule; for since upon A.'s death before the testator there can be no children of his save those already in being (or *en ventre sa mere*), the limitation must vest, if at all, within lives in being.⁸⁰

§ 702. Same—Effect of Remoteness of Limitation. A limitation which is too remote is itself absolutely void, leaving any previous interests, intended to be abridged by the void limitation, unaffected thereby, and therefore rendered alienable. Thus, in case of a devise to A. in fee simple, but if there be at any future time a failure of A.'s heirs then over to B. in fee simple, the limitation to B. being void for remoteness, A. takes an indefeasible fee simple, which he may aliene freely, without regard to the condition attached.⁸¹

⁷⁷ 2 Min. Insts. 447; Gray, Perpet. § 231; *Cattlin v. Brown*, 11 Hare 372; *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; *Hall v. Hall*, 123 Mass. 120.

⁷⁸ 2 Min. Insts. 447; *Fearne*, Rem. 524.

⁷⁹ 1 *Tiffany*, Real Prop. § 154; Gray, Perpet. § 231; *Brown v. Brown*, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640, and cases cited *supra*.

⁸⁰ 1 *Tiffany*, Real Prop. § 154; *Southern v. Wallaston*, 16 Beav. 276.

⁸¹ Gray, Perpet. §§ 247, 250; *Proprietors of Church in Brattle Square v. Grant*, 3 Gray (Mass.) 142, 63 Am. Dec. 725; *Howe v. Hodge*, 152 Ill. 252,

But if there be ulterior limitations contingent upon the termination of that which is too remote, which themselves must necessarily vest, if at all, within life or lives in being and ten months and twenty-one years thereafter, upon the same principles as are applicable in a corresponding case of contingent remainders following upon estates that never vest,⁸² such ulterior limitations are in general to be upheld,⁸³ especially if the ulterior limitation is not intended to take effect in derogation of the remote limitation, but to take effect in case that shall never vest.⁸⁴

§ 703. **Same—Severability of the Contingencies.** A court is not at liberty to separate a limitation which is too remote into two limitations—one to take effect in case the contingency occurs within the period, and the other in case it occurs beyond the period—upholding it as to the former, and invalidating it as to the latter. If the grantor or testator has made it one single limitation, it must stand or fall as a single limitation.⁸⁵

Thus, upon a devise to A. in fee, but if he shall leave no son who shall have reached the age of twenty-five then to B. in fee, the limitation to B. is absolutely void, notwithstanding it might be possible to split the contingency into two parts, as follows: (1) In case A. has no son at all; and (2) in case he has sons that shall not have reached the age of twenty-five at A.'s death; and though the first of these contingencies would not be too remote, since it must be definitely determined within A.'s lifetime or twenty-one years thereafter whether he left any sons. But the court cannot thus dissect the contingency created by the testator into its component parts and make of each a separate contingency.⁸⁶ While the court cannot do this, the testator or grantor can do it himself, and, when he does so, the limitation over may be good upon the happening of one contingency, while void as to the other. Thus if the above-mentioned devise should read "to A. in fee, but if he leaves no son, or if he leaves no son over twenty-five, then to B.

38 N. E. 1083; *Nevitt v. Woodburn*, 190 Ill. 283, 60 N. E. 500; *Watkins v. Quarles*, 23 Ark. 179.

⁸² *Ante*, § 705 et seq.

⁸³ 1 *Tiffany*, Real Prop. § 157; *Gray*, Perpet. § 251 et seq.; *Walker v. Lewis*, 90 Va. 582, 19 S. E. 258. But see *Monypenny v. Dering*, 2 De G., M. & G. 145.

⁸⁴ *Walker v. Lewis*, 90 Va. 582, 19 S. E. 258.

⁸⁵ 1 *Tiffany*, Real Prop. § 157; *Gray*, Perpet. § 331; *Eldred v. Meek*, 183 Ill. 26, 55 N. E. 536, 75 Am. St. Rep. 86; *Post v. Rohrbach*, 142 Ill. 600, 32 N. E. 687. See *Johnston's Estate*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 634, note.

⁸⁶ See authorities *supra*.

in fee," the limitation to B. in the first alternative is good, while that in the second is void for remoteness.⁸⁷

§ 704. Same—Instances of Application of Rule against Perpetuities to Springing Limitations. Instances of the application of the rule to contingent springing limitations are quite common.

Thus, a devise to such of the sons of A. (who is living at testator's death) as shall take holy orders is void for remoteness, since a son of A., should he take orders at all, may not do so within twenty-one years after the death of A. (life in being).⁸⁸ So, a devise to the first son of A. who attains the age of twenty-five (A. having no son of that age at the testator's death) is too remote and void, since no son of A. need necessarily reach that age during A.'s life, or within twenty-one years after his death.⁸⁹

And so, while a devise to the first son of A. who attains the age of twenty-one is valid, since he must attain that age, if at all, during A.'s lifetime (life in being) or in ten months (gestation period) and twenty-one years thereafter,⁹⁰ yet if the devise be to the first son of A. who should attain the age of twenty-two, the limitation is void for remoteness, since that age might be reached only by a son born after A.'s death, in which case the vesting would be postponed beyond the ten months and twenty-one years after the death of A.⁹¹

Again, a devise to such of the testator's grandchildren as shall attain the age of twenty-one is not too remote, for, if the testator has no children living at his death or born thereafter, the grandchildren themselves constitute the lives in being; and if the testator leave children, they constitute the lives in being, and there could be no grandchild who would not become twenty-one within a life or lives in being and ten months and twenty-one years thereafter. But if the age limit were twenty-two, instead of twenty-one, as supposed, the limitation to the grandchildren would be void for remoteness, in case the grandchildren do not themselves constitute the lives in being.⁹²

⁸⁷ 1 Tiffany, Real Prop. § 157; 2 Redfield, Wills, 573; Longhead v. Phelps, 2 W. Bl. 704; Leake v. Robinson, 2 Meriv. 363; Miles v. Harford, 12 Ch. Div. 691; Walker v. Lewis, 90 Va. 582, 19 S. E. 258; Halsey v. Goddard (C. C.) 86 Fed. 25; Perkins v. Fisher, 8 C. C. A. 270, 59 Fed. 801; Seaver v. Fitzgerald, 141 Mass. 401, 6 N. E. 73; Jackson v. Phillips, 14 Allen (Mass.) 572.

⁸⁸ Proctor v. Bishop of Bath, 2 Bl. 358.

⁸⁹ Abbiss v. Burney, 17 Ch. Div. 211.

⁹⁰ Woodruff v. Pleasants, 81 Va. 37.

⁹¹ Otterback v. Bohrer, 87 Va. 548, 12 S. E. 1013; Woodruff v. Pleasants, 81 Va. 37.

⁹² Leake v. Robinson, 2 Meriv. 363; In re Moseley's Trusts, L. R. 11 Eq. (558)

It should be noted, in this connection, that wherever the contingent limitation is to a class, the vesting of the limitations, as to all, being postponed beyond the period prescribed by the rule, the limitation is void as to all the members of the class. Thus, in case of a devise to such of the testator's grandchildren as shall thereafter reach the age of twenty-five (the testator having children living at his death), since, as viewed at the testator's death, it cannot be told which, if any, of the grandchildren will reach the required age within the prescribed period, the limitation is void as to all the members of the class, even as to those who become twenty-five within the period.⁹³ But if the gifts to the members of the class are independent gifts to each, the gift to one member thereof may be valid, while that to another may be void for remoteness.⁹⁴

Similar principles prevail also in the case of limitations made in contemplation of an act of the legislature, or the acquisition of a charter, so as to make the disposition designed legal and valid. Such limitations, to be valid, must be accompanied by some provision requiring them to take effect within the period prescribed. Thus, if the act is to redound to the personal benefit of persons in esse, or if it is to be procured by living persons designated, as the testator's executors, or "within a reasonable time," or "as soon as possible," the contingency is not too remote, and the limitation is valid.⁹⁵

§ 705. Same—Instances of Application of Rule to Shifting or Conditional Limitations.—1. Limitations Shifting upon an Indefinite Failure of Heirs, Heirs of the Body, Issue, etc. It is very clear that any limitation which is only to take effect upon a failure

499; *Pearks v. Moseley*, 5 App. Cas. 714; *Otterback v. Bohrer*, 87 Va. 548, 12 S. E. 1013; *Woodruff v. Pleasants*, 81 Va. 37; *Gerber's Estate*, 196 Pa. 366, 46 Atl. 497; *Eldred v. Meek*, 183 Ill. 26, 55 N. E. 536, 75 Am. St. Rep. 86.

⁹³ 1 *Tiffany*, Real Prop. § 157; *Gray*, Perpet. § 369 et seq.; 1 *Jarman*, Wills, 229; *Pearks v. Moseley*, 5 App. Cas. 714; *Sears v. Putnam*, 102 Mass. 5; *Coggins' Appeal*, 124 Pa. 10, 16 Atl. 579, 10 Am. St. Rep. 565; *Eldred v. Meek*, 183 Ill. 26, 55 N. E. 536, 75 Am. St. Rep. 86.

⁹⁴ 1 *Tiffany*, Real Prop. § 157; *Gray*, Perpet. § 389 et seq.; 1 *Jarman*, Wills, 229; *Catlin v. Brown*, 11 Hare, 372; *Storrs v. Benbow*, 3 De G., M. & G. 390; *Albert v. Albert*, 68 Md. 352, 12 Atl. 11; *Lowry v. Muldrow*, 8 Rich. Eq. (S. C.) 241; *Hills v. Simonds*, 125 Mass. 536; *Dorr v. Lovering*, 147 Mass. 530, 18 N. E. 412. See *Loyd v. Loyd*, 102 Va. 527, 46 S. E. 687.

⁹⁵ 2 *Min. Insts.* 444; *Porter's Case*, 1 Co. 24; *Pleasants v. Pleasants*, 2 Call (Va.) 319, 337; *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. 115 et seq., 7 L. Ed. 617; *Literary Fund v. Dawson*, 10 Leigh (Va.) 152, 1 Rob. (Va.) 418, 419; *Kinnaird v. Miller*, 25 Grat. (Va.) 107. See *Spring Garden Bank v. Hurlings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583.

of one's heirs, or heirs of the body, or issue, or descendants, etc., at any period whatsoever, may, in the event, be postponed beyond the prescribed term of a life or lives in being, and twenty-one years and a few months, and will, therefore, be void for remoteness. Thus, where lands are given by will or grant to A. and his heirs, and upon the failure of his heirs to Z. in fee, one has no difficulty in perceiving that the limitation to Z. is inconsistent with the rule against perpetuities, and is invalid. The mind easily accepts the same conclusion where the limitation to Z. is to take effect upon the failure of the heirs of A.'s body, or of A.'s issue, or of A.'s descendants, since any of those events may, in the course of nature, be postponed for many generations, or may never occur at all.⁹⁶

§ 706. Same—2. Failure of Heirs, etc., at a Definite Time, Not Too Remote. If the failure of heirs, heirs of the body, issue, descendants, etc., upon which the limitation is to shift over to another, must by the terms of the limitation occur, if at all, at a time not too remote, as at the time of the death of the first taker, or at the termination of other lives in being, the rule against perpetuities is not violated, and the subsequent limitation is valid.

Thus, upon a devise to A. in fee, but upon a failure of his heirs (or heirs of the body or issue, etc.), at his death, then to Z. in fee, the limitation to Z. is not too remote and is valid.⁹⁷ So, also, though the contingency upon which the estate is to shift over to another be apparently an indefinite failure of heirs, etc., yet if the second taker is given only an estate for his life, so that, if it vests at all, it must vest in his lifetime (life in being), the rule against perpetuities is not violated, and the second limitation is valid.⁹⁸ And it will be remembered that at common law, where an estate is limited without words of inheritance, the grantee takes only a life estate.⁹⁹

§ 707. Same—3. Limitations upon a Dying without Heirs, Heirs of the Body, Issue, etc. If the limitation be to A. in fee, but if A. die without heirs, issue, etc., then to Z. in fee, one would think it the more legitimate construction (Mr. Hargrave calls it

⁹⁶ 2 Min. Insts. 439.

⁹⁷ 1 Jarman, Wills, 824; Pells v. Brown, Cro. (Jac.) 590; Britton v. Thornton, 112 U. S. 526, 5 Sup. Ct. 291, 28 L. Ed. 816; Dorr v. Johnson, 170 Mass. 540, 49 N. E. 919; Miller's Estate, 145 Pa. 561, 22 Atl. 1044; Newsom v. Holesapple, 101 Ala. 682, 15 South. 644; Weybright v. Powell, 86 Md. 573, 39 Atl. 421; Mulreed v. Clark, 110 Mich. 229, 68 N. W. 138, 989.

⁹⁸ 2 Min. Insts. 441; 3 Lom. Dig. 419; Fearne, Rem. 488; 2 Th. Co. Lit. 646, note (C); Doe v. Lyde, 1 T. R. 598.

⁹⁹ Ante, § 140.

the vulgar, in contradistinction to the technical, construction) that the limitation over to Z. was to occur in case A. had no heirs at the time of his death, in which event it would be good, and would take effect in possession in case it turned out that A. did have no heirs at his decease.¹

But these and similar phrases (e. g., "if he die without heirs," or "without heirs of his body," or "without issue," or "without descendants;" or "upon his dying without heirs," etc.; or "leaving no heirs," etc.) have long been settled (unless there be other words of qualification) to refer to a general and indefinite failure of heirs, etc., at any future time. So that every executory limitation, limited to take effect on such words, is at common law void. Nor is it material in such cases how the fact actually turns out. The possibility that the event may, in point of time, exceed the limits allowed, vitiates the limitation *ab initio*, and also defeats all the limitations that may succeed it, although not themselves too remote.²

The generality of the words "heirs," or "heirs of the body," etc., may be restrained to the period prescribed, by any other words sufficient for the purpose, and then the devise over will be good. Thus, if the limitation were to A. in fee simple, but if he die without heirs living at his death (or leaving no heirs behind him) to Z. in fee, the failure of heirs would be tied up and restricted to the death of A., and so the limitation to Z. would be good. But the word "lend" applied to the first taker, or a direction that the estate limited over upon the failure of issue of the first taker, shall, in the event of his leaving issue, be distributable to such issue as he may think fit, will not confine the failure of issue within the prescribed limits, and consequently will not save the subsequent limitation from being too remote, and, therefore, void.³

This common law rule of construction has been reversed in England and in a majority of the states by statute, so that these expressions we have been considering are made to import, *prima facie*, a definite failure of issue or heirs of the person named; that is, at the time of his death.⁴

§ 708. An Ulterior Limitation is Void, if Full Power of Disposition of the Property be Expressly Given to the First Taker.

¹ Ante, § 706; 2 Min. Insts. 440; Hargrave, Law Tracts, 519.

² 2 Min. Insts. 440; Hargrave, Law Tracts, 519; 2 Th. Co. Lit. 646, note (C); *Beauclerk v. Dormer*, 2 Atk. 308; *Doe v. Fonnereau*, 2 Dougl. 487; *Griffith v. Thomson*, 1 Leigh (Va.) 321.

³ Ante, § 706; 2 Min. Insts. 440; *Porter v. Bradley*, 3 T. R. 143; *Roe v. Jeffery*, 7 T. R. 589; *Callis v. Kemp*, 11 Grat. (Va.) 85.

⁴ 2 Reeves, Real Prop. § 955.

Upon a principle almost the reverse of that animating the rule against perpetuities, but with a like result, namely, the invalidating of the ulterior limitation, it is an established rule that where the full and absolute power to dispose of the property is given to the first taker, and only what is left undisposed of by him is to go to the second taker, the second limitation is void (1) for repugnancy, and (2) because of the uncertainty of the property to go to the second taker.

In holding the ulterior limitation thus void for repugnancy, the courts proceed upon the theory that a true conditional limitation, from its very nature, must hamper and trammel the first taker's power of alienation, and if that power is expressly given the first taker, unhampered and untrammelled, in order to carry it into effect, the subsequent limitation must be declared void. The two intentions of the grantor or testator are inconsistent and self-contradictory, and one or the other must give way.⁵

Thus, upon a devise to A. and the heirs of his body, and if he should die leaving no heirs of his body then living so much of devisor's estate as A. shall be possessed of at his death to G., it is uncertain whether anything will remain to be the subject of the limitation over, which for that reason is void. And it is void also for repugnancy to the estate of the first taker, over which either expressly or by construction A. is given the power of disposition.⁶

§ 709. If One Limitation in a Conveyance be Executory, All Subsequent Ones are in General Executory Limitations Also. An executory limitation may confer either an estate in fee simple or a less estate. On every estate conferred by an executory limitation, another executory limitation may be limited, and if the estate conferred by an executory limitation be an estate for life or for years, it may be followed by a quasi remainder; but whilst the executory estate, after which the remainder is to arise, is in suspense, it is not properly a remainder, but an executory limitation, which is to

⁵ 2 Min. Insts. 443, 444; 1 Tiffany, Real Prop. § 140; Howard v. Carusi, 109 U. S. 725, 3 Sup. Ct. 575, 27 L. Ed. 1089; Fisher v. Wister, 154 Pa. 65, 25 Atl. 1009; Combs v. Combs, 67 Md. 11, 8 Atl. 757, 1 Am. St. Rep. 359; Clay v. Chenault, 55 S. W. 729, 21 Ky. Law Rep. 1485, and cases cited *infra*.

⁶ 2 Min. Insts. 444; 4 Kent, Com. 270; 1 Roper, Legacies, 642; Atty. Gen. v. Hall, Fitzg. 314, 8 Vin. Abr. 103, pl. 50; Miller v. Moore, 9 Vin. Abr. 248, pl. 21; Bull v. Kingston, 1 Meriv. 314; Shermer v. Shermer, 1 Wash. (Va.) 266, 1 Am. Dec. 460. See Howard v. Carusi, 109 U. S. 725, 3 Sup. Ct. 575, 27 L. Ed. 1089; Van Horne v. Campbell, 100 N. Y. 287, 3 N. E. 316, 771, 53 Am. St. Rep. 166; Foster v. Smith, 156 Mass. 379, 31 N. E. 291; Hoxsey v. Hoxsey, 37 N. J. Eq. 21; Kelley v. Meins, 135 Mass. 231.

be converted into a remainder on a particular event. Thus, if land be devised to A. and his heirs, and if A. should not leave issue living at his decease to B. for life, and after B.'s decease to C. in fee, C. would have during A.'s life (whilst the contingency is in suspense), only an executory fee; but if A. should die without issue in B.'s lifetime, C. would take a vested remainder, and an estate in fee simple in possession, if A. should survive B. and then die without issue.⁷

So, upon a devise to A. for life after the death of B., remainder after A.'s death to C. in fee, A.'s estate is a springing limitation until the death of B., and so is C.'s estate, since there is no particular estate in possession to support either as a remainder. But upon B.'s death A.'s estate of freehold comes into possession, and C.'s springing limitation then becomes a vested remainder.

The general proposition is founded on the very nature of executory limitations, which, it will be remembered, are either limitations of freeholds to commence in futuro, without any preceding estate, or of estates to take the place of fees already vested. No estate following such a limitation, therefore, can be a remainder—not in the first instance, because a remainder must, by the definition thereof, be preceded by a particular estate in possession; nor in the second, because no remainder can be limited upon a vested fee simple.⁸

Thus, it is seen that while no limitation, once valid as a remainder, can ever thereafter take effect as an executory limitation,⁹ the converse of the proposition is by no means true; it frequently happening that a limitation once taking effect as an executory limitation, either springing or shifting, may at a later period, under altered conditions, become a remainder. Instances of this sort of transformation have already appeared in the preceding paragraphs. Another illustration of it may be seen in *Brownsword v. Edwards*,¹⁰ which was a case of a devise to A. and his heirs in trust to receive the rents and profits until B. should attain twenty-one, and if B. should attain twenty-one or have issue then to B. and the heirs of his body, but if B. should happen to die before twenty-one “and” (which was read as if it were “or”) without issue, remainder over to S., etc., the inheritance, being vested in A., the trustee, subject to be divested in case B. attained the age of twenty-one, or had issue, made the subsequent limitations at first executory; but when B. had satisfied the contingency, as he did by attaining the age of twenty-one, whereby the land vested

⁷ 2 Min. Insts. 445; Fearne, Rem. 503, note (g).

⁸ 2 Min. Insts. 445; Fearne, Rem. 504.

⁹ *Ante*, § 674.

¹⁰ 2 Ves. Sr. 247.

in him in possession for an estate tail, the limitation to S. became a remainder.¹¹

The fact that the subsequent limitation is executory does not necessarily mean that it is contingent. It may be so limited as from the beginning to be certain of taking effect (saving only the possibility of its expiring before the former estate vests or fails), either in default of the foregoing estate taking effect at all, or by way of remainder after it, if it should take effect.¹² Thus, in *Southby v. Stonehouse*,¹³ where the devise was in substance of the profits of the lands to S. for life, and after his death of the lands themselves to the testatrix's children in tail, and in default of issue of the testatrix to J. H. in fee, and the testatrix died leaving an infant daughter, who shortly afterwards died, the limitation to the children in tail, without a particular estate going before, was executory, and thus made the interest of J. H. also executory, but not contingent. Had the testatrix left no children, he would have taken a vested interest expectant on S.'s death, as in the event that happened he took a vested interest, by way of remainder, after the estate tail of the daughter.¹⁴

And it is necessary, furthermore, to observe that, when the first limitation is a fee, since those following cannot be remainders, they are liable at common law to be defeated by the remoteness of the contingency whereon they are limited, supposing that to be the indefinite failure of issue.

§ 710. Any Number of Executory Limitations, Even of the Fee Simple, may Succeed One Another, if Not Too Remote. While it is true as a general proposition that any number of executory limitations may succeed one another in a conveyance, and they will all be valid, if not too remote, a qualification must be noted in that, if one of the fees chance to vest in right, subject to no condition which may divest it, all the rest are defeated. Thus, in case of a devise to A. and his heirs, and if he die without a son living at his death then in fee simple to the first son of B. who attains twenty-one, and if he has no son then in fee simple to his first daughter who lives to be twenty-one, if no daughter then in fee simple to C., all the limitations are good; but if that to B.'s son vests in right, it defeats all that follow, etc.¹⁵

§ 711. Limitations must Not, upon a Future Contingency, Cease as to Part, and Vest and Revest. This doctrine seems to be founded in the main upon considerations of convenience and policy. The

¹¹ 2 Min. Insts. 445, 446; Fearne, Rem. 506.

¹³ 2 Ves. Sr. 613.

¹² 2 Min. Insts. 446; Fearne, Rem. 507.

¹⁴ 2 Min. Insts. 446.

¹⁵ 2 Min. Insts. 447; Fearne, Rem. 514, note (h).

uncertainty of ownership which would result from such partially divested limitations, and the consequent difficulty of determining against whom proceedings should be had touching the title to lands so situated and to subject them to debts, as well as other inconveniences, constitute very sufficient reasons for adhering to the principle, which is a very ancient one, although its application to executory limitations is, of course, modern, as the limitations themselves are. The doctrine has always existed in respect to conditions and common-law limitations, as to which it has ever been a maxim that they must defeat the whole estate, and cannot determine it for a part only. Thus, a condition, annexed to a feoffment in fee, that if the feoffee die, his heir being under age, his estate shall cease during the minority of the heir, is utterly void; so, also, is a condition that an estate tail shall, upon a contingency, cease as if tenant in tail were dead, which, if it had any effect, would only suspend it during the tenant's life, to revest in his issue; and so, in like manner, it is with executory limitations. An attempt to suspend an estate during the infancy of the party succeeding to it, or upon any other contingency, and again to revest it, is futile, and the limitation is void.¹⁶

A rent, common, or other incorporeal hereditament, newly created, may be limited to cease for a time, and again to revest, as with the proviso that if the grantee die, his heir within age, the tenant, should, during the minority, be quit of the rent. The reason seems to be that, as it is a newly created subject, no adverse claim to it can exist, for the same latitude is not allowed in limitations of rents, etc., previously existing.¹⁷

§ 712. Limitation to Person Not in Esse may be Valid, if Not Too Remote. In the infancy of executory limitations before their limits were definitely ascertained, and whilst yet they were scarcely distinguished from limitations in conveyances at common law, there was sometimes, naturally enough, an absurd rigor of construction resorted to, in order to guard against too great a latitude in what was justly esteemed a violent innovation upon the old common law. Amongst the instances of this excessive jealousy, none is more remarkable than the principle, which was at one time asserted, that whilst a limitation to a nonexisting person per verba de futuro—that is, when the party came into being—was valid, yet

¹⁶ 2 Min. Insts. 448; Fearne, Rem. 526, 530, note (r), 274, 275; Corbet's Case, 1 Co. 87a, 87b; Jermyn v. Arscot, cited 1 Co. 85a; Lade v. Halford, 3 Burr. 1416, 1 W. Bl. 428, 2 Ambl. 479.

¹⁷ 2 Min. Insts. 448; Fearne, Rem. 529; Corbet's Case, 1 Co. 87a; Kempe's Case, 1 Ld. Raym. 52.

if the limitation were *per verba de presenti*—that is, mentioning the party as a person in present existence—it was void. Upon this principle, it was insisted that a devise to an infant *en ventre sa mere* could not be sustained, although it was admitted that, if the limitation were to the child when born, it would be unquestionably good. At present, however, this needless distinction between limitations to nonexisting persons, *per verba de presenti*, and *per verba de futuro*, is very little regarded and is allowed to affect those cases only where there is not the least circumstance from which to collect the testator's or grantor's intention of anything else than an immediate limitation to take effect in *presenti*.¹⁸

A limitation to a child *en ventre sa mere*, although by words *de presenti*, is now subject to no other doubt than the uncertainty of the description; and there can never be any uncertainty if it be described as the child of which such a woman is *enceinte* (without reference to the paternity), even though it be illegitimate. If, however, it be a bastard, it cannot be described as the child of such a man, since that can never be certain, although, if described as the child of the mother, it does not vitiate the description that the limitation assumes such an one to be the father.¹⁹

But if the motive of the gift is the belief that the bastard is the son of such a man, and not the fact that he is so, the gift will generally stand; or where it is evidently the intent of the testator or grantor to give the property to that individual in any event (the cause of the gift not being that a particular person is his father), the mere description of the bastard as the child of such a man, his identity being otherwise ascertained, will not affect the validity of the gift.²⁰

But in no case, it is said, upon principles of public policy, can a limitation be validly made to an illegitimate child, neither born, nor *in ventre matris*—that is, not yet begotten—when the will or deed is executed, so that, although such a child be afterwards born, yet it cannot take.²¹

An illustration of this common-law distinction between present and future words might perhaps arise even to-day. Thus, upon a devise to a society, now in existence, but incapable of taking the property devised, the devise would be void, nor would it in gen-

¹⁸ 2 Min. Insts. 448, 449; Fearn, Rem. 553 et seq.; Goodright v. Cornish, Salk. 226; Doe v. Carleton, 1 Wils. 225.

¹⁹ 2 Min. Insts. 449.

²⁰ 1 Min. Insts. 446.

²¹ 2 Min. Insts. 449; 2 Lom. Ex'rs, 35; Earle v. Wilson, 17 Ves. 528; Gordon v. Gordon, 1 Meriv. 150 et seq.; Meltram v. Devon, 1 P. Wms. 529.

eral become valid by the subsequent acquisition of the capacity to take. But a devise to such society, when it shall become capable of taking, would be good as an executory devise, if not too remote.²²

§ 713. Disposition of Title to Property Devised, Pending the Contingency—1. Lands. It is a rule that wherever there is an executory devise of real estate, and the freehold is not in the meantime disposed of, the freehold and inheritance descend to the testator's heirs at law. And so, where a preceding estate is limited, with an executory devise over of the land, the intermediate profits between the determination of the first estate and the vesting of the limitation over will go to the heir at law, if not otherwise disposed of. Indeed, every interest and all profits, not disposed of, out of real estate, pass to the heir, and that not by the will of the testator, but by the act of the law. Hence, in case of a devise to A. in fee, to commence six months after testator's death, during those six months the estate descends to and continues in the heirs; and hence, also, where a testator devised lands to B. for life, remainder to B.'s sons successively, remainder to the unborn sons of C., and provision was made for the disposition of the rents and profits during the minorities of those who were to take in future, and B. died in the testator's lifetime, whereby B.'s life estate, and the remainders to his sons, failed, the limitations to C.'s sons ensued as executory devises, and the profits from the testator's death till the birth of a son to C. went to the testator's heirs at law.²³

But it should be observed that a devise of all the rest and residue of the real estate will pass to the residuary devisee, as well the profits from the testator's death to the time of the estate's vesting, as from the termination of the first estate to the vesting of a subsequent one.²⁴

§ 714. Same—2. Disposition of Title to Chattels Prior to the Vesting of an Executory Limitation. Where there is no residuary clause, nor other particular disposition of it, it seems that personal property and its profits, between the testator's death and the vesting of an executory estate, or between the determination of the first limitation and the vesting of a subsequent one, will accumulate for the benefit of the person next to take by virtue of the limitations. Thus, where a testator bequeathed personalty to the first

²² 2 Washburn, Real Prop. 345; ante, § 704.

²³ 2 Min. Insts. 449, 450; Fearne, Rem. 537; Hopkins v. Hopkins, Cas. temp. Talbot, 51, 52.

²⁴ 2 Min. Insts. 450; Fearne, Rem. 544; Stephens v. Stephens, Cas. temp. Talbot, 228.

son of A. when he should attain twenty-one, and A. had no son at the testator's death, Lord Hardwicke held that the profits of the property should accumulate until A.'s son, who might be afterwards born, attained the age of twenty-one, and then pass to him. And so where a testator bequeathed chattels, including several leasehold houses for years, to M., an infant, and if M. should die before twenty-one, and his mother should have no other child, then to W.; M. died during infancy, and Lord Hardwicke decreed that the rents and profits from the death of M. till the contingency should happen were to accumulate, and to be added to the capital, and if M.'s mother should have no other child they should go to W.²⁵

§ 715. **Transfer of Executory Limitations, and Their Liability for Debts.** Much the same principles apply with respect to the transmissibility of executory limitations, whether vested or contingent, and their liability for the debts of the owner, as apply in the case of remainders.²⁶

Executory limitations in all manner of property, lands and personalty, by the modern construction, are capable of being devised by will, assigned, or conveyed by deed, and of being transmitted by inheritance and succession to the devisee's or grantee's heirs or personal representatives, although it seems that, in case of the assignment of possibilities, the assignee's remedy and protection are in equity.²⁷

§ 716. **Trusts for Accumulation.** The general rule, as we have seen, touching executory limitations, is that any future limitation may be made, so as the same is to take effect within a life or lives in being, including in those lives children then en ventre sa mere, and twenty-one years beyond the expiration of such life or lives and the time of gestation, so as to allow for the birth of a child in ventre matris. Under this rule, prescribing the bounds to executory limitations, it is in the power of the testator or grantor to suspend not only the ownership of the inheritance for the limited time but also to suspend for a like period the intermediate enjoyment, so as to accumulate the income and add it to the principal, and thus aggrandize the remote issue of the family, at the expense of the present, and perhaps of the two or three succeeding genera-

²⁵ 2 Min. Insts. 450; Fearne, Rem. 546, 547; *Bullock v. Stones*, 2 Ves. Sr. 521; *Studholme v. Hodgson*, 3 P. Wms. 300.

²⁶ Ante, § 657 et seq.; 2 Min. Insts. 421, 422.

²⁷ 2 Min. Insts. 451, 421, 422; Fearne, Rem. 366, 550, et seq.; *Wright v. Wright*, 1 Ves. Sr. 411; *Selwin v. Selwin*, 1 W. Bl. 254, note (m); *Roe v. Griffith*, 1 W. Bl. 605; *Jones v. Roe*, 3 T. R. 93; *Perry v. Phillips*, 1 Ves. Jr. 254, 256. For the application of the doctrine of transmissibility to legacies payable at a future time, see Fearne, Rem. 552, note (g); 2 Min. Insts. 451.

tions. Availing himself of this rule, one Peter Thellusson, a Frenchman by birth, but from an early age settled in London, as a merchant, and who had there accumulated a fortune of over £700,000, by his will, dated in 1796, and consummated by his death in 1797, made a settlement of his large estate in a manner which produced a very lively sensation in England. He left surviving him a wife and three sons, all married, and three daughters, of whom one was married, and a number of grandchildren, the offspring of his sons. He gave his "dear wife" 300 guineas, a certain quantity of plate, certain wines and liquors, her own jewels and trinkets, and £2,140 a year for life, subject to certain conditions; to his sons, including previous advancements, £23,000 each; to his daughters a provision of about £12,000 each, and to other persons trifling legacies besides; and then the great bulk of his estate (about £600,000) to trustees in trust to cause the income to be accumulated during the lives of all his sons, and all his grandsons living at his death, or then *en ventre sa mere*, and at the expiration of that period, to be divided into three lots, one to go to the family of each son—that is, one to the eldest male lineal descendant then living of each, in tail male, with cross remainders over amongst such descendants.²⁸

²⁸ 2 Min. Insts. 451, 452; Fearne, Rem. 538, note (x), 435, note (h); Thellusson v. Woodford, 4 Ves. 227. It was computed by the actuaries employed for the purpose that, according to the probabilities of life, the period of accumulation might equal ninety-five years; that there was more than an equal chance that it would exceed seventy, and a reasonable probability of its reaching eighty years; that within the last-named space of time every £100 would be increased fifty-fold, so that the amount then to be distributed would be in round numbers £30,000,000!

This will was assailed with all the vigor and learning of the English bar, and Mr. Hargrave particularly distinguished himself by an argument of exhaustive research, in which he went over the whole judicial history of executory limitations, from the first faint intimation of the possibility thereof, in 2 & 3 Ph. & M., A. D. 1555 (2 Dy. 124a), through their feeble development in the reign of Elizabeth, to their distinct recognition by Lord Coke, in *Matthew Manning's Case*, 8 Co. 946, their final establishment in *Pells v. Brown*, Cro. Jac. 590, and the rules by degrees laid down for their regulation, in point of time, in the subsequent cases, allowing at first only one life within which the future limitations should take effect, then several lives, wearing out the same time, and finally, with many an intervening struggle, any number of lives in being and twenty-one years after, with an allowance of the time of gestation for a posthumous child.

In the course of this great argument, Mr. Hargrave passed in review all the leading cases upon the subject, showing the gradual modifications, and occasional fluctuations of opinion, down to the great Case of Perpetuities, as it is called (*Howard v. Duke of Norfolk*, 3 Ch. Cas. 1, 2 Swanst. 454), and sought to deduce from the general tenor of the cases, amongst other inferences, first, that executory limitations, and the rules governing them,

This will was sustained and the decision gave rise to the statute 39 and 40 Geo. III, c. 98 (A. D. 1800), whereby such trusts of accumulation in England by will are limited, for the most part, to a period of twenty-one years from the testator's death.²⁹

Similar acts have been passed in several of the states of this country, although the statutes vary as to the period for which property may be tied up for accumulation.

originated from an exercise of discretion by the judges, for the sake of general convenience; secondly, that there was in the courts a right of further exercising their discretion for the same purpose, whenever cases pregnant with any great evil shall provoke it; thirdly, that from the infancy of executory limitations to their maturity there has prevailed amongst the greatest judges an intense jealousy of their liability to abuse, and a decided aversion to extending their limits. He then proceeds to arraign, with great and just severity, the "frenzy of posthumous avarice" evinced by the testator, and to point out various particulars wherein he thought he had exceeded as well the letter as the spirit of the limits so jealously assigned for future limitations, and concludes with a very notable peroration, in which he introduces Lord Nottingham, who by his judgment in the Duke of Norfolk's Case (3 Ch. Cas. 1, 2 Swanst. 454) had confirmed and defined with remarkable force and precision the doctrine of executory limitations, as applauding and enforcing the decree which the advocate hoped would be pronounced against the will, and he ingeniously makes that celebrated founder of modern equity sum up the historical statement, and the argument, with great terseness and vigor.

The Thellusson Case was finally disposed of in the House of Lords in 1859. The last surviving grandson died in February, 1856, and immediately the litigation was renewed in order to determine who was the "eldest male lineal descendant" of the oldest son, Peter Isaac Thellusson; there being no dispute as to the representative of the youngest son, Charles, and the second son, George Woodward T., having died without male descendants, whereby the property was to be divided into two instead of three parts.

The plaintiff in the bill, the "Hon. Arthur Thellusson," born in 1801, the son of Peter Isaac, was his "eldest male descendant," then living, yet "Lord Rundlesham," the defendant, though himself born in 1840, was the only son of Frederick, an older son of Peter Isaac, and therefore claimed to be the "eldest male descendant" in point of representation, and according to the intent of the testator, and so it was held, both by the Master of the Rolls and by the House of Lords.

The fund, when thus distributed, had increased but little! See 2 Min. Insts. 454.

²⁹ 2 Min. Insts. 453; Fearne, Rem. 540, note (x).

PART IV.

THE VARIOUS ESTATES IN LAND, AS RESPECTS THE COMMUNITY OF INTERESTS THEREIN.

§ 717. **Severalty of Interest and Community of Interest Distinguished.** Estates of any quantity or duration, absolute or qualified, in presenti or in futuro, may be held in severalty; that is, by a single tenant, or by a plurality of tenants possessing a common interest in the estate, such as it is. In the latter case, the estate is said to be held in (1) joint tenancy, (2) tenancy by entireties, (3) tenancy in common, or (4) tenancy in coparcenary, respectively, according to the circumstances.³⁰

A tenant or occupant of lands is said to hold them in severalty, when he holds them in his own right only, without any other person being connected with him in point of interest during his estate therein. This is the most usual way of holding an estate, and, therefore, the same observations may be made here that were made in the preceding chapter, touching estates in possession, as contradistinguished from those in expectancy—that there is little or nothing peculiar to be remarked concerning estates in severalty, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise, and that in laying down general rules and doctrines we usually apply them to such estates as are held in severalty. We may, therefore, proceed to consider the other class of estates, where there is a plurality of tenants.³¹

³⁰ 2 Min. Insts. 465, 466; 2 Bl. Com. 179 et seq.

³¹ 2 Min. Insts. 466; 2 Bl. Com. 179.

CHAPTER XXVIII.

JOINT TENANCY.

- § 718. Nature of a Joint Tenancy.
- 719. Modes of Creating a Joint Tenancy.
- 720. The Properties of a Joint Tenancy.
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- 738. 5. The Unity of Time Indestructible.
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- 740. Deed Necessary for Voluntary Partition of Freeholds.
- 741. Effect of Voluntary Partition.
- 742. 7. Destruction of Unity of Possession by Compulsory Partition.
- 743. Advantages and Disadvantages of Dissolving the Jointure.

§ 718. Nature of a Joint Tenancy. An estate in joint tenancy is where lands or tenements are granted or devised to two or more persons, to hold in fee simple, for life, for years, or at will. It is sometimes called an estate in jointure, which has the same meaning as joint tenancy; but in common speech the term jointure is now usually confined to that joint estate (as in its origin it was) which is vested in husband and wife, as a statutory satisfaction and bar of the woman's dower.¹

¹ 2 Min. Insts. 466, 477; ante, § 288 et seq.; 2 Bl. Com. 180.

Joint tenants, tenants by entireties, tenants in common, and coparceners, all have this common characteristic, that they hold pro indiviso, or promiscuously. So that one person is not seised or possessed exclusively of one acre, and another person of another (for then they would be tenants in severalty), but the interest and possession of each extend to every specific portion of the whole land of which they are co-tenants. And, accordingly, in all of them the possession of one is considered for most purposes as that of all. In many points of view, however, these several species of estates are materially distinguishable in character and properties, as will be perceived in the successive unfolding and development of each.²

§ 719. **Modes of Creating a Joint Tenancy.** A joint tenancy arises by act of the parties, and never by act of the law. It may be created by devise, or by any conveyance inter vivos, by words which give an estate to a plurality of persons, without adding any restrictive, exclusive, or explanatory words. Thus, if an estate be granted to A. and B., and their heirs, this makes them joint tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both.³

And so a devise or grant to A. and his children, supposing that A. has children living then, or at the testator's death, creates a joint tenancy in A., and those children, at common law, for life. But in case of a will, those children only are included who were in being at the testator's death, unless a contrary intention can be inferred from the provisions of the will or the circumstances of the case.⁴

On the other hand, supposing A. to have no children at the date of the grant, or at the testator's death, the word "children," unless the context requires a different construction, is a word of limitation, and vests a fee tail in A.⁵

Formerly joint tenancy was much favored, for the feudal reason that it prevented the division of the useful services, such as military or agricultural services, or rent, and the multiplication of

² 2 Min. Insts. 466, 467; 1 Stephens, Com. 312.

³ 2 Min. Insts. 467; 2 Bl. Com. 180; 1 Stephens, Com. 325, 326.

⁴ 2 Min. Insts. 467; 2 Jarman, Wills (5th Ed.) 154, note, 156, and cases cited, 393, 394; Cook v. Cook, 2 Vern. 545; Buffar v. Bradford, 2 Atk. 221; Read v. Willis, 1 Collier, 87; Morton v. Tewart, 2 Yo. & Col. Ch. 81, 82; Wilson v. Maddison, 2 Yo. & Col. Ch. 375; Pyne v. Franklin, 5 Sim. 458; De Witte v. De Witte, 11 Sim. 41; Paine v. Wagner, 12 Sim. 188.

⁵ Ante, § 172; 2 Min. Insts. 467; 2 Jarman, Wills (5th Ed.) 389, 392; Wild's Case, 6 Co. 17a, 17b; Davis v. Stevens, 1 Dougl. 321; Broadhurst v. Morris, 2 B. & Ad. (22 E. C. L.) 1.

the merely honorary services, such as fealty.⁶ But for more than a century past the courts have laid hold of every available expression to construe estates given to a plurality of tenants as tenancies in common. And although this innovation began in equity, and in reference to wills, yet it has long prevailed in the courts of common law as well, and the doctrine extends to deeds as uniformly as to wills. Hence such expressions as "equally to be divided," "share and share alike," "respectively between and amongst them," will, according to this modern construction, convert into a tenancy in common, what would once have been a joint tenancy.⁷

§ 720. The Properties of a Joint Tenancy. The properties of a joint estate are derived from its unity, which, as Blackstone remarks, is fourfold: The unity of interest, the unity of title, the unity of time, and the unity of possession, or more properly, entirety of interest. Or, in other words, joint tenants have one and the same interest or estate, arising by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. Perhaps the tenancy is still better expressed by Lord Coke, who, speaking after Bracton, describes the joint tenant as "*sic totum tenens et nihil tenens, scilicet totum conjunctim et nihil per se separatim.*"⁸

The properties, however, may be well enough classed under the several unities above mentioned, namely: (1) Unity of title; (2) unity of interest or estate; (3) unity of time; and (4) unity of possession.⁹

§ 721. Same—1. Unity of Title. The estate of joint tenants must be created by one and the same act, whether legal or illegal, as by one and the same grant, or one and the same disseisin. For joint tenants cannot arise by descent, or act of the law, but merely by purchase, or acquisition by the act of the party; and unless that act be one and the same, the two tenants would have different titles, of which one might prove good and the other bad, thereby destroying the jointure.¹⁰

§ 722. Same—2. Unity of Interest or Estate. Joint tenants must have one and the same interest. One cannot be tenant for life, and another for years; one cannot be tenant in fee, and the other for life. On the other hand, however, there may be joint ten-

⁶ 2 Min. Insts. 467, 496.

⁷ 2 Min. Insts. 467, 468; 2 Bl. Com. 180, note (4); 1 Th. Co. Lit. 773, note (42); Hoxton v. Griffith, 18 Grat. (Va.) 574.

⁸ 2 Min. Insts. 468; 2 Bl. Com. 180; 2 Th. Co. Lit. 733.

⁹ 2 Min. Insts. 468.

¹⁰ 2 Min. Insts. 468; 2 Bl. Com. 181; 2 Th. Co. Lit. 728, 731.

ants as to a portion of the fee, with a several interest in one or more of them as to the residue.

Thus, as Littleton remarks: "If lands be given to two and to the heirs of one of them, this is a good jointure, and the one hath a freehold and the other a fee simple. And if he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life. In the same manner it is where tenements be given to two and the heirs of the body of one of them engendered, the one hath a freehold and the other a fee tail, etc." To which Lord Coke subjoins this comment: "By this section, and the 'etc.' in the end of it, they are joint tenants for life, and the fee simple or estate tail is in one of them; and because it is by one and the same conveyance, they are joint tenants, and the fee simple is not executed to all purposes, as hath been said before."¹¹

§ 723. Same—3. Unity of Time. The estates of joint tenants must vest in interest at one and the same period, as well as by one and the same title; as in case of a present estate made to A. and B., or a remainder in fee to A. and B. after a particular estate, in either case A. and B. are joint tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder (which is contingent) be limited to the heirs of A. and B., and during the continuance of the particular estate A. dies, whereby the remainder of one moiety is vested in his heir, and then B. dies, thereby vesting the other moiety in the heir of B.; now A.'s heir and B.'s heir are not joint tenants of this remainder, but tenants in common, for one moiety vested at one time, and the other at another. So, if an estate be granted to A. for life, remainder to B. and the eldest son of Z. (he having at the time no son), and their heirs, B. does not take in joint tenancy with Z.'s eldest son, because B. takes a vested remainder in a moiety immediately on the execution of the conveyance, while the remainder in the other moiety does not vest until a son is born to Z.; nor at all at common law, if A. dies first. If a son is born to Z. in A.'s lifetime, still B. had up to that period no joint interest with him, the tenancy was not *ab initio* a joint tenancy, and not being so at first cannot become so afterwards.¹²

In conveyances operating under the statute of uses, and in devises, it is not needful that the original vesting of the several estates should be at the same time. It suffices if the parties take by the same conveyance. Thus, a devise to A. and his children (A.

¹¹ 1 Th. Co. Lit. 746, 744; Fearne, Rem. 23, 24, 28, 29; 2 Min. Insts. 468, 469.

¹² 2 Min. Insts. 469, 470; 2 Bl. Com. 181; 1 Stephens, Com. 313; 1 Th. Co. Lit. 731, 732.

having one child at the time of the will, and others afterwards) carries a joint estate to A. and all his children in being at the death of testator; the estate vesting in those in existence at that time, and afterwards opening to let in those subsequently born. This deviation from the rule prevailing at common law has been accounted for by supposing that, upon the introduction of the new tenant, the old estate is revoked, and a new estate arises, which vests at the same time in all then in being, or ready to take. The explanation, however, is not altogether satisfactory, since it appears that, if the first party alienates or charges the estate before the second is born, or ready to take, the alienation or charge, though void in respect to the share of the second party, will continue good in respect to the share of the first, which it is supposed could not be the case if that person's original estate had been revoked. The tendency of the modern adjudications is to hold that it is a joint claim by the same conveyance, and not the vesting at the same time, which makes joint tenants, and that the rule is the same in conveyances at common law and under the statutes of uses and wills.¹³

§ 724. **Same—4. Unity of Possession.** What Blackstone, and most writers after him, have denominated unity of possession, might with more propriety be styled entirety and equality of interest; for, while they continue to hold together, they are not considered as holding in distinct shares, but each is equally entitled to the whole. And, on the other hand, though the entirety ceases for the purpose of alienation, every co-tenant being entitled at pleasure to transfer separately his own share, yet the equality remains; for each is capable of conveying an equal share with the rest. This combination of entirety of interest with the power of transferring in equal shares is expressed by the ancient law maxim that every joint tenant is seised *per mie et per tout*, which seems to import a seisin not by the moiety and by the whole, as Blackstone represents (using the word "my," instead of "mie"), but by nothing and by the whole, the French *mie* meaning not moiety, but nothing. This is clearly conveyed by Lord Coke, who, commenting on the phrase *per mie et per tout*, remarks (citing Bracton as already mentioned): *Et sic totum tenet, et nihil tenet, scil., totum conjunctim, et nihil per se separatim*. "And albeit they are so seised, as for example, where there be two joint tenants in fee, yet to divers purposes each

¹³ 2 Min. Insts. 470; 2 Bl. Com. 182, note (8); Fearne, Rem. 313 et seq., note (e); 2 Th. Co. Lit. 732, note (D); Gilb. Uses, 104; 4 Kent, Com. 358, note (d); Shelley's Case, 1 Co. 101, a, note (Q, 3), Thomas' Ed.; Mutton's Case, 3 Dy. 274 b; Samme's Case, 13 Co. 57; Stratton v. Best, 2 Bro. Ch. 240, notes (2) and (a); Doe v. Morgan, 3 T. R. 765.

of them hath but a right to the moiety, as to enfeoff, give or devise," etc.¹⁴

This mode of possession (*per mie et per tout*), by entireties in common and nothing separately, with the power of transferring in equal shares, which is an essential characteristic of a joint estate, excludes the possibility of husband and wife being joint tenants; they constituting but one person in law. When land is conveyed to them, after marriage, not expressly to hold as tenants in common, they are said to be seised by entireties; but in consequence of their legal oneness, neither can dispose of any part without the assent of the other, but the whole must remain at common law to the survivor.¹⁵

From the entirety of interest in each of the co-tenants results the most remarkable incident or consequence of a joint estate, namely, that it is subject to survivorship or the *jus accrescendi*, presently to be explained.¹⁶

§ 725. Incidents of a Joint Tenancy—Enumeration. The incidents or consequences of joint tenancy all depend upon that entirety of interest which has just been described, and which is indicated by the phrase *per mie et per tout*, which, it must be remembered, imports that joint tenants, while the jointure endures, own by entireties together, and nothing separately, but with power of transferring in equal shares.¹⁷

§ 726. Same—1. Effect of Lease by Two Joint Tenants, Reserving Rent. The rent shall enure to both, in respect of their joint reversion, even though it were in terms payable to one only; but if the lease and reservation of rent had been by deed indented, the rent would have enured to him only to whom it was reserved.¹⁸

But upon a joint lease by two or more joint tenants, there may be a separate reservation to each; and, if so, there must be separate actions for the arrears; and even where the reservation of rent was,

¹⁴ 2 Min. Insts. 470, 471; 2 Bl. Com. 182; 1 Stephens, Com. 314, 315, note (m); *Daniel v. Camplin*, 7 M. & Gr. 172, note (c); *Murray v. Hall*, 7 Man. Gr. & S. 455, note (a); Appendix Wythe's Rep. (Va.) 391 (Minor's Ed.), note by Mr. W. Green.

¹⁵ Post, § 744 et seq.; 2 Min. Insts. 471; 1 Stephens, Com. 314, 315; 1 Th. Co. Lit. 739-40, note (L); *Case of Alton Woods*, 1 Co. 30a, note (E, 1); *Green v. King*, 2 W. Bl. 1211; *Doe v. Parratt*, 5 T. R. 652; *Thornton v. Thornton*, 3 Rand. (Va.) 179; *Norman v. Cunningham*, 5 Grat. (Va.) 63; *Hemingway v. Scales*, 42 Miss. 1, 93 Am. Dec. 425, 2 Am. Rep. 586.

¹⁶ Post, § 732; 2 Min. Insts. 471, 472, 476; 2 Bl. Com. 182; 1 Stephens, Com. 315.

¹⁷ Ante, § 695; 2 Min. Insts. 472, 470; Wythe (Va.) Rep. (Minor's Ed.) 396, note by Mr. W. Green.

¹⁸ 2 Min. Insts. 472; 2 Th. Co. Lit. 84; 1 Th. Co. Lit. 734; 2 Bl. Com. 182.

in the first instance, joint, yet, if it were not under seal, a notice from one of the joint tenants to the lessee to pay him separately, and a payment, accordingly, is evidence of a fresh separate demise of his share, and for subsequent arrears he must sue separately.¹⁹

§ 727. **Same—2. Livery of Seisin, Surrender or Notice to, or Entry or Possession by, One Joint Tenant Enures to All.** These depend upon the entirety of interest vested in joint tenants, since each has the whole jointly and nothing separately.²⁰

And so it is of a release and confirmation respectively, to one of several joint tenants. They enure to all, and for the same reason.²¹

Since the possession by one joint tenant is the possession by all, it follows that one cannot maintain an action of trespass against his fellow in respect to the land, because he has an equal right to enter on any part of it. And, upon like principles, one joint tenant is incapable of maintaining an action of ejectment against another, unless there is proof of an actual ouster, or of some other act amounting to a total denial of the plaintiff's right as co-tenant, of which an undisturbed sole possession for many years may afford proof.²²

And when the adverse possession thus established has continued uninterruptedly for the length of time prescribed by the statute of limitations, it will give a good and sufficient title to the occupant.²³

And as every joint tenant, and tenant in common, occupies a position of trust and confidence towards his companions, he is not, as a general rule, allowed to purchase an outstanding adverse title to the common property for his own benefit, to the exclusion of his co-tenants. But the co-tenant must, within a reasonable time, make his election to claim the benefit, and contribute to the expense of the purchase; and if he unreasonably delays, until there is a change in the condition of the property, or in the circumstances of the parties, he will be held to have abandoned all claim to the benefit of the new acquisition. But in order that this presumption may arise, it should appear, not only that he has been apprised of the purchase, but of the adverse claim set up under it, by his companion, for he may

¹⁹ 2 Min. Insts. 472; 2 Bl. Com. 182, note (11); *Powis v. Smith*, 5 B. & Ald. 850.

²⁰ 2 Min. Insts. 472; 2 Bl. Com. 182; 1 Th. Co. Lit. 734, note (D); 2 Th. Co. Lit. 378; *Chapman v. Chapman*, 91 Va. 398, 21 S. E. 813, 50 Am. St. Rep. 846; *Pillow v. Southwest Virginia Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

²¹ 2 Min. Insts. 473; 2 Th. Co. Lit. 465, note (Z), 530.

²² 2 Min. Insts. 473.

²³ 2 Min. Insts. 473; *Stonestreet v. Doyle*, 75 Va. 356, 40 Am. Rep. 731.

reasonably suppose that the acquisition is made in support of the common title, and may act on that supposition. The burden in such a case is upon the purchasing tenant to show that his co-tenant had notice, both of the purchase and of the exclusive claim, in consequence of it, asserted by him. The conveyance by the purchasing tenant to a third person, is not, in itself, such a notice; nor are the acts of purchase and conveyance acts equivalent to an actual ouster, in pursuance of the statute above referred to.²⁴

§ 728. Same—3. Joint Tenants must at Common Law Convey, One to Another, by Release. No conveyance, operating by livery of seisin, would be proper between joint tenants, because, each tenant being seised of the whole conjointly, there is nothing that can be delivered to him which he does not possess already. On the other hand, and for the same reason, a release is the proper form of assurance, each having the legal possession or seisin of the whole, so that, when one parts with his interest to the rest, he is simply dismissed from the joint ownership; his fellow or fellows still continuing seised of the whole as before. The release in such case operates by way of passing an estate (*de mitter l'estate*).²⁵

§ 729. Same—4. Joint Tenant can Do No Act Tending to Defeat or Injure Estate of Co-tenant. His co-tenant being seised equally with himself of the whole, and the possession of one being the possession of both, whatever conveyance or lease either tenant may make, although it profess to be of all, operates to pass only his part. And if it be a simple charge, not amounting to an actual transfer of the estate, and the maker of it die first, the survivor takes the property at common law, discharged of all the incumbrances, according to the maxim "*Jus accrescendi proferitur oneribus, sed alienatio rei proferitur juri accrescendi.*"²⁶

But although the seisin of a joint tenant is *per totum et per nihil* (of the whole jointly, and of nothing severally), and although his capacity is to transfer a distinct share undivided, and not by metes and bounds, yet a joint tenant's conveyance by metes and bounds is not void. It cannot, indeed, affect injuriously the co-tenant, but as against the grantor, it is effectual to pass his interest in the land making the grantee tenant in common with the co-tenant.

²⁴ 2 Min. Insts. 473; *Pillow v. Southwest Virginia Imp. Co.*, 92 Va. 145, 23 S. E. 32, 53 Am. St. Rep. 804; *Darcey v. Bayne*, 105 Md. 365, 66 Atl. 434, 10 L. R. A. (N. S.) 863; *Allen v. Allen*, 114 Wis. 615, 91 N. W. 218. See, 1 Washburn, *Real Prop.* (6th Ed.) § 859.

²⁵ 2 Min. Insts. 474; 2 Th. Co. Lit. 514; 1 Th. Co. Lit. 765, note (E); *Gilbert, Ten.* 73, 74.

²⁶ 2 Min. Insts. 474; 2 Bl. Com. 193, note (13); 1 Th. Co. Lit. 748; *Tuttle v. Eskridge*, 2 Munf. (Va.) 330.

§ 730. **Same—5. Joint Tenants must Sue and be Sued Jointly.** This is an inevitable consequence of the entireties by which joint tenants are seised. Their estates being one and the same, their titles one and the same, and their interest entire, *per totum conjunctim, et per nihil separatim*, there can be no foundation for anything but a joint suit, whether the joint tenants are plaintiffs or defendants, unless, indeed, they avail themselves of their rather inconsistent capacity to transfer distinct shares for a time, as by separate leases reserving rent, in which case they not only may, but must, sue for the rent separately; and if they have occasion to bring an action to recover the land thus separately demised, it must be a separate action.²⁷

§ 731. **Same—6. Liability of Joint Tenants to Co-Tenants for Waste Done or Profits Received.** At common law, a joint tenant was not liable at all to his co-tenants for waste committed or profits received by him. This doctrine arose out of the consideration that either tenant had a right to the separate occupancy of the whole, and that, if one permitted his fellow to occupy the premises exclusively, he had only himself to blame for waste committed, or for any surplus above his due share of profits received, unless, in the latter case, the co-tenant in possession had been constituted expressly the bailiff or agent of his companion, when an action of account always lay against the party receiving.²⁸

But as to waste, this principle was corrected by Stat. Westm. II (13 Edw. I, c. 22, A. D. 1285), whereby the action of waste is given to one tenant in common of the inheritance against another, who makes waste in the common estate, the equity of which statute was held to extend to joint tenants, but not to coparceners, because they could always guard against such an injury by compelling partition, which the common law did not permit joint tenants and tenants in common to do. In respect of nonaccountability for surplus profits over and above his proper share, received by one co-tenant, no remedy was applied by statute until 4 Anne, c. 16 (A. D. 1706), whereby joint tenants and tenants in common were made accountable, one to another, for receiving more than their due share of the profits of the common estate. Coparceners it seems were not mentioned in this statute for the same reason as before, namely, that they had it in their power to prevent the injury by compelling a partition.²⁹

But notwithstanding the mention by the statute of the action of account, the usual proceeding is not by that action, but by a bill in

²⁷ 2 Min. Insts. 474, 475; 2 Bl. Com. 182, notes (11), (12); 1 Th. Co. Lit. 733; Doe v. Chaplin, 3 Taunt. 126.

²⁸ 2 Min. Insts. 475.

²⁹ 2 Min. Insts. 475.

equity, which, by its commissioner, can adjust the account more conveniently than can be done in the action at law, where resort must be had to several persons as auditors.³⁰

§ 732. **Same—7. Survivorship or Jus Accrescendi.** The doctrine of survivorship is the grant incident of joint estates, which more than any other distinguishes them from the other instances of estates held in common. It is the immediate consequence of the peculiar mode in which joint tenants are seised, namely, *per totum et per nihil*, or *per mie et per tout*; for if A. and B. are joint tenants in fee, and each is seised of the whole jointly, but of nothing separately (but with capacity to transfer an equal share), and A. dies, he can transmit nothing to his heir, but leaves B. seised as before of the whole, but now with no one to share with him.³¹

This right of survivorship is called the *jus accrescendi*, because the right upon the death of one joint tenant accumulates and increases to the survivors; or as Bracton and Fleta express it, "*Pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimum superstitem.*" It is usually, but not necessarily, mutual. Thus, if lands be let to A. and B. during the life of A., if B. dies, A. has all by survivorship; but if A. dies, the estate is at an end, and B. takes nothing.³²

Notice must, moreover, be taken of a diversity, as to survivorship, between a bare trust or authority and a trust coupled with an interest. The bare trust or authority does not survive; the latter does, as in the case of a deed of trust.³³

And also a farther diversity, as to survivorship, should be noted, between joint estates in chattels generally, which are subject to the *jus accrescendi*, and in capital or stock in trade, amongst merchants and traders, as to which there is no survivorship, out of regard to the interests of trade, the maxim being "*Jus accrescendi inter mercatores pro beneficio commercii, locum non habet.*"³⁴

But although the title to partnership chattels does not survive, and, therefore, the surviving partner has no power to dispose of the deceased partner's share, but the same goes to the latter's personal representative, yet it is otherwise as to the choses in action of the partnership. They do survive, and the remedy is to be prosecuted

³⁰ 2 Min. Insts. 476; 2 Bl. Com. 183, note (14); 3 Bl. Com. 227; 3 Th. Co. Lit. 245, note (26), 346, note (15); 1 Story, Eq. Jur. §§ 446, 466.

³¹ 2 Min. Insts. 476; 2 Bl. Com. 183, 184; 1 Th. Co. Lit. 736 et seq.

³² 2 Min. Insts. 476; 2 Bl. Com. 184, note (16); 1 Th. Co. Lit. 737.

³³ Post, § 1048; 2 Min. Insts. 476, 477; 1 Th. Co. Lit. 738; *Combe's Case*, 9 Co. 75b; 1 Sugden, Powers, 143; *Mosby v. Mosby*, 9 Grat. (Va.) 590, 591; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 19, 20, 7 Am. Dec. 513.

³⁴ 2 Min. Insts. 477; 1 Th. Co. Lit. 738, note (1); 3 Th. Co. Lit. 297.

in the name of the surviving partner. The chattels in possession are to be distributed between the survivor and the personal representative of the deceased partner, in the same manner as they would have been upon a voluntary dissolution *inter vivos*.³⁵

§ 733. **Modes of Terminating a Joint Tenancy—Discussion Outlined.** We have seen that every joint estate has four properties or unities, namely, the unities of title, estate, time and possession. The destruction of any one of these (that is capable of destruction) will destroy the joint tenancy. Hence we are to consider the following modes of destroying or terminating the joint estate: (1) The destruction of the unity of title by the transfer of the tenant's share to a stranger; (2) the destruction of the same unity by the transfer of a joint tenant's share to one of his co-tenants; (3) the destruction of the unity of estate by the transfer of part of one joint tenant's estate to a stranger or to a co-tenant; (4) the destruction of the same unity by the acquisition of the inheritance by one of two joint tenants for life or for years; (5) there can be no destruction of the unity of time; (6) the destruction of the unity of possession by voluntary partition; (7) the destruction of the same unity by compulsory partition under decree of court. If any other unity than that of possession be destroyed, the joint tenancy is converted into a tenancy in common.³⁶

§ 734. **Same—1. Destruction of Unity of Title by Transfer of Tenant's Share to a Stranger.** If one joint tenant conveys his share to a third person, according to the power reserved to him (notwithstanding he is otherwise seised only *per totum, conjunctim*), or in equity, which looks upon what ought to be done as actually done, if he contracts to convey, the jointure is severed, as to the tenant so conveying, and as between his alienee and the other tenants, it is turned into a tenancy in common. For instance, if A., B. and C. are joint tenants in fee, and A. alienes to Z., Z. is thenceforward, as to B. and C., a tenant in common, but, as between themselves, B. and C. are still joint tenants. But a devise of one's share by will is no severance of the jointure; for no will takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has, therefore, a priority to the other) is already vested, "whereby it appeareth," says Lord Coke, "that Littleton, by these words—*post mortem, et per mortem*—though they jump at one instant,

³⁵ 2 Min. Insts. 477; Story, Partn., § 342; *Buckley v. Barber*, 6 Exch. 177 et seq.

³⁶ Ante, § 721 et seq.

yet alloweth priority of time in the instant, which he distinguisheth by per and post"; the rule of law being that *jus accrescendi præferatur ultimæ voluntati*.³⁷

§ 735. **Same—2. Destruction of Unity of Title by Transfer of Tenant's Share to One of His Co-Tenants.** Thus, if A., B. and C. be joint tenants in fee, and C. convey, or in equity contract to convey, his share to B., the jointure is dissolved as to C.'s share; for, whilst the two remaining parts are still held in jointure, B. holds C.'s original share by a different title, taking effect at a different time, by means of a different conveyance, and as to that share is a tenant in common with A.³⁸

The proper mode, at common law, whereby one joint tenant should convey to his fellow, is not by feoffment, or by any conveyance operating, at common law, by livery of seisin, which is, indeed, impossible, each tenant being already seised of the whole, but by release, which enures by way of mitter l'estate, and not by way of extinguishment.³⁹

§ 736. **Same—3. Destruction of Unity of Estate by Transfer of Part of Joint Tenant's Estate.** Thus, if there be two joint tenants in fee, and one makes a lease for life of his share, this defeats the jointure; for it destroys the unity of title, as well as of interest, the reversion following the condition of the freehold. Although, if the tenant for life die in the life of both the original joint tenants, they become joint tenants as before. And so, if there be two joint tenants for years, and one of them lets his share for a part of the term, the jointure is severed, it seems irrevocably.⁴⁰

§ 737. **Same—4. Destruction of Unity of Estate by Acquisition of Inheritance by One of Several Joint Tenants for Life or for Years.** If there be several joint tenants for life (or for years), and the inheritance is afterwards purchased by, or descends upon, either, it is a severance of the jointure; for the lesser estate merges in the inheritance, and thus the tenants cease to have the same estate or interest. But, as we have seen, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure without merging in the inherit-

³⁷ 2 Min. Insts. 478, 479; 2 Bl. Com. 185, 186, note (18); 1 Th. Co. Lit. 752 et seq., 759, 755, note (U).

³⁸ 2 Min. Insts. 479; 2 Bl. Com. 186; 1 Th. Co. Lit. 764.

³⁹ 2 Min. Insts. 479; 1 Th. Co. Lit. 765, note (E).

⁴⁰ 2 Min. Insts. 479; 2 Bl. Com. 163; 1 Th. Co. Lit. 754 et seq., 760 et seq. But if the joint tenancy is a freehold, a lease for years will not destroy the jointure, because none of the unities is thereby destroyed. The tenants are, notwithstanding the lease for years, possessed of the same interest (freehold), vested by the same title and at the same time, as before.

ance, because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate.⁴¹

§ 738. **Same—5. The Unity of Time Indestructible.** The unity of time respects only the original commencement of the joint estate, and cannot (being now past) be affected as to the original parties by any subsequent transactions.⁴²

§ 739. **Same—6. Destruction of Unity of Possession by Voluntary Partition.** The joint tenancy may be destroyed, without any alienation, by disuniting the possession of the tenants by partition of the land among them. For as joint tenants must be seised *per totum et per nihil*, everything that tends to prevent their being seised throughout the whole is a severance of the jointure. Hence, if two joint tenants part their lands and hold them in severalty (or in equity agree to do so), they are no longer joint tenants; for they have now no joint interest in the whole, but only a several interest in the respective parts. And for that reason, also, the right of survivorship is by such separation destroyed.⁴³

Such partition may be either (1) by common consent of the several co-tenants, or voluntary partition; (2) by decree of court, or compulsory partition.

By the common law all the joint tenants might agree to make partition of the lands, but one of them could not compel the others so to do; for, this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent—a reason which has been justly characterized as more specious than solid, good sense seeming rather to indicate that in cases capable of severance of interest the jointure should continue, as in case of partnership, so long as both parties should consent, and no longer.⁴⁴

§ 740. **Same—Deed Necessary for Voluntary Partition of Freeholds.** Partition of estates of freehold between joint tenants made by consent, even at common law, requires a deed; mutual livery of seisin between the parties (which is sufficient in case of tenants in common) being impracticable in consequence of that entirety of seisin which is so marked a characteristic of joint tenancy. But

⁴¹ 2 Min. Insts. 479, 480; 2 Bl. Com. 186; 1 Th. Co. Lit. 744, 745, note (N); Wiscot's Case, 2 Co. 60b, 61a, note (G).

⁴² 2 Min. Insts. 480; 2 Bl. Com. 185.

⁴³ 2 Min. Insts. 480; 2 Bl. Com. 185.

⁴⁴ 2 Min. Insts. 480; 2 Bl. Com. 185; 1 Th. Co. Lit. 753; 1 Story, Eq. Jur. § 647.

an agreement to make partition may be enforced in equity, although not under seal, whenever a similar agreement to convey would be enforceable.⁴⁵

§ 741. **Same—Effect of Voluntary Partition.** If the parties labor under no disability, and no fraud or misrepresentation is shown, an inequality in value, or irregularity in proceeding, will not affect the validity of the partition, especially if it has been long acquiesced in by the parties.⁴⁶

But when the parties, or either of them, labor under any disability, or there has been fraud or misrepresentation in making the partition, a court of equity will within a reasonable time set the partition aside, and correct it in those particulars wherein it is liable to objection, just as the court would do in case of any other transaction, attended by similar objections.⁴⁷

§ 742. **Same—7. Destruction of Unity of Possession by Compulsory Partition.** This is the most usual method of determining estates held in common, whether as joint tenants, tenants in common or estates in coparcenary; its effect, like that of voluntary partition, being due to the fact that the unity of possession is thereby destroyed.

§ 743. **Advantages and Disadvantages of Dissolving the Jointure.** In general, it is advantageous for joint tenants to dissolve the jointure, where the right of survivorship still subsists; for, since by the dissolution the *jus accrescendi* is taken away, each tenant may transmit his own part to his own heirs. Sometimes, however, that very privilege of survivorship confers a marked advantage, and then, of course, the continuance of the joint tenancy is desirable. Thus, if A. and B. be joint tenants for life, during the jointure each has an estate in the whole for the life of his companion, and if he survive for his own life also; whereas, if they make partition, each has an estate in his own share for his own life merely.⁴⁸

⁴⁵ 2 Min. Insts. 480, 481; 1 Th. Co. Lit. 704, 705, note (57), 753, note (R); 2 Th. Co. Lit. 449, note (G); *Frewen v. Relfe*, 2 Bro. Ch. 224.

⁴⁶ 2 Min. Insts. 481; 1 Th. Co. Lit. 692, 708.

⁴⁷ 2 Min. Insts. 481; 1 Th. Co. Lit. 692, 710, 712; *Fitzhugh v. Foote*, 3 Call (Va.) 17.

⁴⁸ 2 Min. Insts. 494; 2 Bl. Com. 187.

CHAPTER XXIX.

TENANCY BY ENTIRETIES.

§ 744. Nature of Tenancy by Entireties.

745. Incidents of Tenancy by Entireties.

1. Disability of Either Consort to Convey His or Her Share During the Coverture.

746. 2. Doctrine of Survivorship.

747. Termination of Tenancy by Entireties.

§ 744. **Nature of Tenancy by Entireties.** The tenancy by entireties is governed by much the same principles that control joint tenancy. Indeed, in one aspect, it may be said to be a joint tenancy, modified by the common-law principle that the husband and wife are but one person¹ for this tenancy can exist only where the persons to whom the property is given are husband and wife at the time of the gift; it not being created by a conveyance or devise to persons in joint tenancy who afterwards marry.²

It is not essential, however, that the husband and wife should be the only grantees or devisees; but if there are other grantees, the husband and wife (because of their legal identity) are regarded as one person only, so that they take only one share between them, not a share apiece. Thus, if land be granted or devised to a husband and wife and another, the husband and wife, *prima facie* at least, take one-half of the estate between them, and the third person the other half.³

If land be thus given to a husband and wife, whether it is to be regarded as a tenancy by entireties, or a joint tenancy, or a tenancy in common merely, is a matter of the intention of the grantor or testator; but in the absence of a clear intent manifested to

¹ 2 Min. Insts. 471; *Thornton v. Thornton*, 3 Rand. (Va.) 179; *Norman v. Cunningham*, 5 Grat. (Va.) 63; *Morris v. McCarty*, 158 Mass. 11, 32 N. E. 938; *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Brownson v. Hull*, 16 Vt. 309, 42 Am. Dec. 517.

² 2 Min. Insts. 471; 1 Tiffany, Real Prop. § 165; *Morris v. McCarty*, 158 Mass. 11, 32 N. E. 938; *Hardenbergh v. Hardenbergh*, 10 N. J. Law, 42, 18 Am. Dec. 371; *Holt v. Wilson*, 75 Ala. 58; *Stuckey v. Keefe*, 26 Pa. 397. See *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337, 43 Am. St. Rep. 762, 30 L. R. A. 305, and note.

³ 2 Min. Insts. 471; 4 Kent, Com. 363; 1 Washburn, Real Prop. 425; *Jupp v. Buckwell*, 39 Ch. Div. 148; *Thornton v. Thornton*, 3 Rand. (Va.) 179; *Barber v. Harris*, 15 Wend. (N. Y.) 615; *Hardenbergh v. Hardenbergh*, 10 N. J. Law, 42, 18 Am. Dec. 371.

the contrary it is *prima facie* to be regarded as a tenancy by entireties.⁴

§ 745. **Incidents of Tenancy by Entireties—1. Disability of Either Consort to Convey His or Her Share during the Coverture.** It is one of the incidents of a joint tenancy, as we have seen,⁵ that while the tenants hold *per mie et per tout*, yet each may convey to a co-tenant or to a stranger a distinct share.

In this respect, the tenancy by entireties differs radically from an ordinary joint tenancy. While the husband at common law, under his ordinary marital right of disposing of and managing his wife's lands during the coverture, might during the coverture control and dispose of his wife's share of the land held by entireties,⁶ yet with this exception, in consequence of their legal oneness, neither can dispose absolutely even of his or her own part of the property without the other's assent, but the whole remains at common law to the survivor.⁷

§ 746. **Same—2. Doctrine of Survivorship.** We have seen that survivorship existed at common law as between joint tenants because of the manner of their holding—*per mie et per tout*.⁸ This being the doctrine of the common law with respect to joint tenants, it should have been, and was, *a fortiori* applicable to tenants by entireties, whose oneness or identity was much more pronounced than that existing between joint tenants.⁹ Furthermore, the tenancy by entireties being a distinct form of tenancy, the statutes abolishing joint tenancies in various states have been held not applicable to tenancies by the entireties.¹⁰

⁴ 1 Tiffany, *Real Prop.* § 165; 1 Preston, *Est.* 132; 4 Kent, *Com.* 363; *Hunt v. Blackburn*, 128 U. S. 464, 9 Sup. Ct. 125, 32 L. Ed. 488; *Fulper v. Fulper*, 54 N. J. Eq. 431, 34 Atl. 1063, 32 L. R. A. 701, 55 Am. St. Rep. 590; *Hiles v. Fisher*, 144 N. Y. 313, 39 N. E. 337, 43 Am. St. Rep. 762, 30 L. R. A. 305; *Young's Estate*, 166 Pa. 645, 31 Atl. 373; *Fladung v. Rose*, 58 Md. 13.

⁵ *Ante*, § 724.

⁶ 1 Tiffany, *Real Prop.* § 165; *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Ames v. Norman*, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269; *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302.

⁷ 2 Min. Insts. 471; 2 Bl. *Com.* 182; 4 Kent, *Com.* 362; 1 Tiffany, *Real Prop.* § 165; *Thornton v. Thornton*, 3 Rand. (Va.) 179; *Norman v. Cunningham*, 5 Grat. (Va.) 63; *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337, 43 Am. St. Rep. 762, 30 L. R. A. 328, note; *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462; *Rogers v. Grider*, 1 Dana (Ky.) 242; *Needham v. Branson*, 27 N. C. 426, 44 Am. Dec. 45; *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266.

⁸ *Ante*, § 732.

⁹ 2 Min. Insts. 477. See authorities cited *ante*, § 745.

¹⁰ 1 Washburn, *Real Prop.* (6th Ed.) § 915.

§ 747. **Termination of Tenancy by Entireties.** The estate by entireties might be terminated at common law by the joint deed of husband and wife conveying the share of either or the shares of both, it becoming a tenancy in common with the grantee in the first instance and a tenancy of the grantee in severalty in the second; but neither consort could at common law by his or her sole act convey his or her share, so as to destroy the consort's right of survivorship upon the death of the one who makes such conveyance.¹¹ Nor could land so held be partitioned during the coverture, since this would imply a separate interest in each tenant, contrary to the fundamental conception of the tenancy at common law.¹²

But a divorce or dissolution of the marriage terminates the tenancy at common law, rendering the tenants thenceforth joint tenants, as they would have been had they never been married;¹³ and then, of course, partition might be obtained by either.¹⁴

¹¹Ante, § 745.

¹²Gray v. Bailey, 117 N. C. 439, 23 S. E. 318; Chandler v. Cheney, 37 Ind. 391; Ketchum v. Walsworth, 5 Wis. 95, 68 Am. Dec. 49; 1 Tiffany, Real Prop. § 165.

¹³1 Tiffany, Real Prop. § 165; Stelz v. Shreck, 128 N. Y. 263, 28 N. E. 510, 13 L. R. A. 325, 26 Am. St. Rep. 475; Donegan v. Donegan, 103 Ala. 488, 15 South. 823, 49 Am. St. Rep. 53; Hopson v. Fowlkes, 92 Tenn. 697, 23 S. W. 55, 23 L. R. A. 805, 36 Am. St. Rep. 120; Russell v. Russell, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581; Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337, 43 Am. St. Rep. 762, 30 L. R. A. 333, note.

¹⁴1 Tiffany, Real Prop. § 165; Russell v. Russell, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581; Harrer v. Wallner, 80 Ill. 197.

CHAPTER XXX.

TENANCY IN COMMON.

- § 748. Nature of the Tenancy in Common.
- 749. Modes Whereby Tenancy in Common may be Created—Enumeration.
- 750. 1. Express Limitation.
- 751. 2. Grant of Undivided Part of One's Land to a Stranger.
- 752. 3. Grant or Devise of Lands to Two or More Persons "Equally to be Divided between Them," etc.
- 753. 4. Breaking Up of Estates in Joint Tenancy or in Coparcenary.
- 754. Properties of Tenancy in Common.
- 755. Incidents of Tenancy in Common—Enumeration.
- 756. 1. To Sue and be Sued Severally.
- 757. 2. Actions of Waste and Account.
- 758. 3. Possession by One Tenant in Common Enures to All.
- 759. 4. Repair of Premises Belonging to Tenants in Common.
- 760. 5. No Survivorship between Tenants in Common.
- 761. 6. Mode Whereby One Tenant in Common may Convey His Share to His Co-tenant.
- 762. Termination of Tenancy in Common.
- 763. 1. Union of All the Shares in One Person.
- 763. 2. Partition between Tenants in Common.

§ 748. **Nature of the Tenancy in Common.** A tenancy in common is where two or more hold the same land, with interests accruing under different titles, or accruing under the same title, but at different periods, or conferred by words of limitation importing that the grantees are to take in distinct shares.¹

In this tenancy there is not necessarily any unity of title, for one may hold by purchase from A., and another by purchase from B.; nor any unity of time, for one's estate may have vested fifty years ago, and that of the other but yesterday; nor any unity of estate or interest, for one tenant in common may be entitled in fee simple, and the other for life or for years. Neither is there that entirety of interest which so remarkably characterizes joint tenancy, for each is seised or possessed of a distinct though undivided share; from which also it follows that there is no survivorship, that is, by the effect of the tenancy itself, for by express limitation there may be. The union consists or may consist only in this: That they hold the same land *pro indiviso*, by a possession in common, or promiscuously.²

¹ 2 Min. Insts. 494; 1 Stephens, Com. 323; *Carneal v. Lynch*, 91 Va. 117, 20 S. E. 959, 50 Am. St. Rep. 819.

² 2 Min. Insts. 494, 495; 2 Bl. Com. 191, 192; 1 Stephens, Com. 323; 1 Th. Co. Lit. 758.

§ 749. Modes Whereby Tenancy in Common may be Created—Enumeration. A tenancy in common may be created by (1) a limitation to two or more persons to hold expressly as tenants in common; (2) a grant of part of one's land to a stranger; (3) a devise or grant of lands to two or more persons, equally to be divided between them; and (4) a breaking up of estates in joint tenancy and in coparcenary.

§ 750. Same—1. Express Limitation. "If lands be given to two," says Littleton, "to have and to hold, scil., the one moiety to the one and his heirs, and the other moiety to the other and his heirs, they are tenants in common;" and Lord Coke adds that the reason is because they have several freeholds, and an occupation *pro indiviso*. And so it is if lands be given to two or more to hold as tenants in common, and not as joint tenants.³

§ 751. Same—2. Grant of Undivided Part of One's Land to a Stranger. "If a man, seised of certain lands, enfeoff another of the moiety of the same land (and the like law is if it be of a third or fourth part), without any speech of assignment or limitation of the same moiety in severalty, at the time of the feoffment, then the feoffee and the feoffor shall hold their parts of the land in common;" for as they do not derive their titles by the act of the law, but by that of the parties, they are not parceners, and as they do not claim by one and the same conveyance, taking effect at one and the same time, they are not joint tenants, nor are they seised in severalty, but *pro indiviso*. They must therefore be tenants in common.⁴

§ 752. Same—3. Grant or Devise of Lands to Two or More Persons, "Equally to be Divided between Them," etc. The doctrine that the phrases "equally to be divided," "share and share alike," "respectively between and amongst them," etc., will make a tenancy in common, was at first confined to wills, and to the courts of equity, but has long prevailed in the courts of law also, and in reference not only to wills, and to conveyances under the statute of uses, but also in respect to conveyances at common law.⁵

This is an instance of a change of policy in the law, to which allusion has already been made. Formerly joint tenancy was much favored, and the common law, in its construction, leaned to it rather than to tenancy in common; because the divisible services issuing from land (as rent, etc.) were not divided, nor the entire serv-

³ 2 Min. Insts. 495; 1 Th. Co. Lit. 772; 1 Stephens, Com. 325; 2 Bl. Com. 193.

⁴ 2 Min. Insts. 495; 1 Th. Co. Lit. 773; 1 Tucker, Com. 182.

⁵ Ante, § 729; 2 Min. Insts. 496, 497; 2 Bl. Com. 180, note (4).

ices (as fealty) multiplied by joint tenancy, as they must necessarily be upon a tenancy in common. The leaning in later times, however, has been the other way, the right of survivorship being often inconvenient and harsh in its effect; and, therefore, in wills, and in other conveyances referred to, which came into use in comparatively modern times, and where a more liberal construction is, in some respects, allowed, than in the case of a common-law conveyance, a tenancy in common will be created by words which, in the latter case, might have operated as a limitation in joint tenancy.⁶

§ 753. Same—4. Breaking Up of Estates in Joint Tenancy or in Coparcenary. If an estate in joint tenancy or coparcenary be destroyed by breaking up any of its constituent unities, except that of possession, a tenancy in common always results. Thus, if one of two joint tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint tenant are tenants in common; for they have now several titles derived from different sources, and also dissimilar interests, the former joint tenant holding in fee simple, and the other for his own life only. And it may be observed, in passing, that if the alienee die, living the alienor and the former joint tenant, the two are joint tenants again; but if either dies, living the alienee, the jointure is finally determined. In like manner, if one of two parceners alienes his share, the alienee and the remaining parcener are tenants in common, because they hold by different titles, the parcener by descent, and the alienee by purchase. Nor is this doctrine repugnant to that with which we set out, namely, that tenancy in common is by act of the parties, which in this case is plainly true, notwithstanding one of the parties claims by descent.⁷

§ 754. Properties of Tenancy in Common. A tenancy in common requires no other unity than that of possession. The occupancy of the lands is undivided, and neither of them knoweth his part in severalty.⁸

§ 755. Incidents of Tenancy in Common—Enumeration. The incidents which belong to tenancy in common may be set forth under the following heads, namely: (1) To sue and be sued severally; (2) actions of waste and of account; (3) possession by one tenant in common is the possession of all; (4) the reparation

⁶ 2 Min. Insts. 496; 2 Th. Co. Lit. 773, note (42); 2 Bl. Com. 192; 1 Stephen, Com. 326.

⁷ 2 Min. Insts. 496, 497; 2 Bl. Com. 192; 1 Th. Co. Lit. 759, 762; 1 Stephens, Com. 324.

⁸ Ante, § 748; 2 Min. Insts. 497; 1 Th. Co. Lit. 750.

of the premises owned by tenants in common; (5) nonsurvivorship; (6) mode whereby one tenant in common may convey his share to the other.

§ 756. **Same—1. To sue and be sued severally.** At common law, to sue and be sued severally is an universal incident of tenancy in common, when the action is real or mixed, because the tenants have, or at least may have, separate and distinct titles. In respect to personal actions, including claims for injuries done to the premises held in common, by trespass or otherwise, tenants in common are, at common law, to sue and be sued jointly. Hence, if tenants in common make a grant in fee simple, reserving a rent in fee, and, the rent being unpaid, an assize, which is a real action, is brought to recover the seisin of the rent, it must be instituted by them separately; but if the object is merely to recover the arrears, which is done by means of debt, or some other personal action, it is prosecuted jointly, and on the death of either the action survives.⁹

§ 757. **Same—2. Actions of Waste and of Account.** Tenants in common could not, at common law, recover one against another for waste committed, any more than joint tenants,¹⁰ and for the same reason essentially, namely, that each was entitled to the possession of the undivided whole, and so might obtain redress as to waste on the part of his fellow, by entering upon and occupying the premises. So, also, a tenant in common could not, any more than a joint tenant at common law, call his fellow to account for receiving more than his proper share of profits, unless he had constituted him his bailiff or receiver.¹¹

These common-law principles were changed as to waste by the statute 13 Edw. I, c. 22; and the statute 4 Anne, c. 16, provided for an action of account, which in practice has been displaced by a bill in equity for an accounting for all overshare of profits received.¹²

Every tenant in common has a right, notwithstanding the statute, to possess, use, and enjoy the common property severally, accounting to his co-tenants, under the statute, for so much of the rents and profits as he may receive. And where such tenant in common uses the property to the total or partial exclusion of his

⁹ 2 Min. Insts. 497; 1 Th. Co. Lit. 777, 782, et seq.

¹⁰ Ante, § 731; 2 Min. Insts. 498; 2 Bl. Com. 183, 194; 1 Th. Co. Lit. 787.

¹¹ Ante, § 731; 2 Min. Insts. 498; 2 Bl. Com. 183, 194; 1 Th. Co. Lit. 787; *Watts v. Watts*, 104 Va. 269, 51 S. E. 359.

¹² Ante, § 731; 2 Min. Insts. 498; 2 Bl. Com. 183, 194; 1 Th. Co. Lit. 787.

co-tenants, the best measure of his accountability to them is their share of a fair rent of the property so occupied and used by him.¹³

§ 758. Same—3. Possession by One Tenant in Common Entures to All. As each tenant in common is entitled to an undivided portion of the whole, he is entitled to occupy the whole, and the possession by one is looked upon as a possession in the interest of all, unless it be expressly negatived. Hence, in an action by one tenant in common, joint tenant, or parcener, against a co-tenant, for the land, the plaintiff must prove an actual ouster, or some other act amounting to a total denial of the plaintiff's right as co-tenant. The mere possession by the co-tenant is not sufficient, that being no more than he is entitled to. But sole and uninterrupted possession by one tenant in common, for a great number of years (e. g., thirty-six years), without any account, or demand made, justifies presumption of ouster.¹⁴

So, also, if A. and B. are tenants in common of land, of which A. alone has actual seisin, yet upon B.'s death her husband is entitled to curtesy in her share, though she has never had the actual *pedis positio* of the land during the coverture; but A.'s possession is hers also, and she is regarded as having had a seisin in fact during the coverture.¹⁵

In general, the same observations are applicable here as in the case of joint tenants.¹⁶

In the case of chattels personal, a very singular consequence results from the unity of possession existing between tenants in common, namely, that if one take the whole chattel to himself, out of the possession of the other, the other has no other remedy but to take it again from the wrongdoer, to occupy in common, when he can "see his time." It is only where the chattel held in common is totally destroyed by his companion that a tenant in common can sue his fellow.¹⁷

§ 759. Same—4. Repair of Premises Belonging to Tenants in Common. If there be two tenants in common or joint tenants of a house or mill, and it fall into decay, and the one is willing to re-

¹³ 2 Min. Insts. 498; *Graham v. Pierce*, 19 Grat. (Va.) 38, 39, 100 Am. Dec. 658; *Names v. Names*, 48 Neb. 701, 67 N. W. 751.

¹⁴ 2 Min. Insts. 498, 499; 1 Th. Co. Lit. 784, note (N), 789, note (J); *Taylor v. Hill*, 10 Leigh (Va.) 457; *Filbert v. Hoff*, 42 Pa. 97, 82 Am. Dec. 493; *Booth v. Adams*, 11 Vt. 156, 34 Am. Dec. 680.

¹⁵ 1 Washburn, Real Prop. 137; *Sterling v. Penlington*, 2 Eq. Cas. Abr. 730; *Wass v. Bucknam*, 38 Me. 360.

¹⁶ Ante, § 727; 2 Min. Insts. 472, 473.

¹⁷ 2 Min. Insts. 499; 1 Th. Co. Lit. 786, note (Q); 1 Chitty, Plead. 178.

pair the same, and the other is not, he that is willing shall have a writ de reparatione facienda, but not so as to fences or other enclosures, nor without a previous request to join in the reparation and a refusal, nor unless the expenditure has been previously actually made. The parties being in equali jure, equality of burden is equity, and hence the obligation of each to contribute.¹⁸

The common-law writ de reparatione facienda seems in modern times to have been superseded mainly by a proceeding in equity to demand contribution,¹⁹ or by a proceeding for the partition of the land, if the co-tenant declines in advance to contribute.²⁰

§ 760. Same—5. No Survivorship between Tenants in Common. Between tenants in common there are no entireties, and therefore the doctrine of survivorship does not apply as between them; but upon the death of either his share descends to his heirs.²¹

§ 761. Same—6. Mode Whereby One Tenant in Common may Convey His Share to His Co-Tenant. At common law, one tenant in common may enfeoff his companion, with livery of seisin, but cannot release to him as a joint tenant may, because tenants in common have several freeholds, and are not seised by entireties. On the other hand, coparceners may both enfeoff and release, because, to some extent, their seisin is joint, and to some several.²² One tenant in common may also convey to another by a conveyance operating under the statute of uses.²³ And where a tenant in common does convey his share to another, the share is undivided, and the fact that he describes it by metes and bounds, or otherwise, in his conveyance, does not create in the grantee another or different interest from that which he himself possesses, and nothing but an undivided interest passes by such deed.²⁴

In the case of freeholds, tenants in common may transfer their interests one to another by feoffment, with livery, at common law,

¹⁸ 2 Min. Insts. 499; 1 Th. Co. Lit. 787; 4 Kent, Com. 370; Lewis' Bowles' Case, 11 Co. 82b.

¹⁹ See Taylor v. Baldwin, 10 Barb. (N. Y.) 582; Mumford v. Brown, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; Beaty v. Bordwell, 91 Pa. 441; Ward v. Ward, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911; Alexander v. Ellison, 79 Ky. 148; Stevens v. Thompson, 17 N. H. 103; Farrand v. Gleason, 56 Vt. 633.

²⁰ Leigh v. Dickeson, 15 Q. B. Div. 60; Calvert v. Aldrich, 99 Mass. 74, 96 Am. Dec. 693.

²¹ 2 Min. Insts. 499; 1 Th. Co. Lit. 789, note (T).

²² 2 Min. Insts. 500; 1 Th. Co. Lit. 788, 789.

²³ 2 Min. Insts. 500.

²⁴ Woods v. Early, 95 Va. 307, 28 S. E. 374.

which, independently of the statute 29 Car. II, c. 3, might as well have been made by parol as by deed.²⁵

§ 762. Termination of Tenancy in Common—1. Union of All the Shares in One Person. If the co-tenants unite in conveying their shares to a stranger or to a single co-tenant, such holder of all the shares becomes at once possessed in severalty.²⁶

§ 763. Same—2. Partition between Tenants in Common. The compulsory partition of lands between tenants in common by decree of court, though not permitted at common law, for reasons already given in connection with joint tenancy,²⁷ is now freely permitted.²⁸

But voluntary partition, by the mutual consent of all the tenants, was recognized even at common law as a mode of terminating the tenancy in common, as it also did the joint tenancy, converting the interest of each tenant into an estate in severalty.²⁹

²⁵Ante, § 761; 2 Min. Insts. 501; 1 Th. Co. Lit. 705, 753; 4 Kent, Com. 368.

²⁶2 Min. Insts. 501.

²⁷Ante, § 739.

²⁸1 Washburn, Real Prop. (6th Ed.) § 918.

²⁹2 Min. Insts. 501, 480; ante, § 739 et seq.

CHAPTER XXXI.

TENANCY IN COPARCENARY.

- § 764. Nature of Tenancy in Coparcenary.
- 765. Coparcenary Estates Created Only by Descent.
- 766. Properties of Estates in Coparcenary.
 - 1. Unity of Title.
- 767. 2. Unity of Interest or Estate.
- 768. 3. Unity of Possession.
- 769. Incidents of Estates in Parcenary—Enumeration.
- 770. 1. Suing and Being Sued.
- 771. 2. Entry or Possession by One Parcener Enures to All.
- 772. 3. Liability of Parceners to One Another for Trespass or Waste.
- 773. 4. Accounting for Profits.
- 774. 5. Modes Whereby Parceners may Convey to One Another.
- 775. 6. Liability to Curtesy and Dower.
- 776. 7. Compulsory Partition.
- 777. Modes of Terminating Tenancy in Coparcenary.
 - 1. In General.
- 778. 2. One Parcener Transferring His Share to a Stranger.
- 779. 3. Union of All the Shares in the Hands of One Parcener.
- 780. 4. Voluntary Partition by Mutual Consent.
- 781. Voluntary Partition Implies a Warranty.
- 782. Doctrine of Hotchpot.
 - 1. At Common Law.
- 783. 2. General Doctrine of Hotchpot in the United States.

§ 764. Nature of Tenancy in Coparcenary. A tenancy in coparcenary arises where lands of inheritance descend from the ancestor to two or more persons as joint heirs. In England, it arises either by the common law, or by the custom of particular places. By common law, as where a person seised in fee simple dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives. In this case they shall all inherit, and these coheirs are then called coparceners, or for brevity parceners only, though in some points of view, the law considers them as together making only one heir. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, etc.¹

§ 765. Coparcenary Estates Created Only by Descent. An estate in parcenary can arise by descent only, and never by purchase, as joint tenancy and tenancy in common do, so that, if two sisters purchase lands, to hold to them and their heirs, they are not par-

¹ 2 Min. Insts. 503; 2 Bl. Com. 187; 1 Th. Co. Lit. 678 et seq.; 1 Stephens, Com. 319.

ceners, but joint tenants; and hence, also, no lands can be held in coparcenary, but those wherein the estates are estates of inheritance, whereas not only estates in fee, but for life or years, may be held in joint tenancy, or tenancy in common. Nor, it seems, do estates *pur auter vie*, limited to the heirs as special occupants,² constitute an exception to this general rule; the heirs in such case taking, not by descent, properly, as heirs, but by force of the limitation as purchasers, and consequently as joint tenants.

§ 766. **Properties of Estates in Coparcenary—1. Unity of Title.** The properties of coparcenary estates are in some respects like those of joint tenants, there being the same unities of interest and of title, and an unity of possession, but not exactly that entirety of interest which characterizes joint tenancy, nor is there any unity of time.³

Thus, since coparceners or coheirs derive their estates by descent mediately or immediately from the same ancestor, it follows, of course, that the title must be one and the same. It is not requisite, however, that the interest should vest at the same period. For if a man have two daughters to whom his lands descend in coparcenary, and one dies before the other, without partition having been made, the surviving daughter and the heir of the other, or, if both are dead, their two heirs, are still parceners, the estates vesting in each of them at different times, though it be the same estate in point of quantity, and held by the same title.⁴

§ 767. **Same—2. Unity of Interest or Estate.** Coparceners must needs have one and the same estate, namely, an estate of inheritance, because they derive it by descent from a common ancestor. But it is not necessary that they should have equal shares. Thus, if a man die, leaving a daughter and three granddaughters, the issue of a deceased daughter, who died before him, they will all be coparceners; but the daughter will take three times as large a share as each of the granddaughters, who will have amongst them the moiety of their mother.⁵

§ 768. **Same—3. Unity of Possession.** Coparceners have an unity of possession, but not exactly that entirety of interest which belongs to joint tenants. They constitute but one heir, how many soever they be, but are properly entitled each to the whole of a distinct moiety, and not as joint tenants are, *per nihil et per totum* to the whole jointly, and to nothing separately. Of course, there-

² 2 Min. Insts. 99; 2 Bl. Com. 188; 1 Stephens, Com. 319.

³ 2 Min. Insts. 504; 2 Bl. Com. 188; 1 Stephens, Com. 319.

⁴ 2 Min. Insts. 504; 2 Bl. Com. 188; 1 Stephens, Com. 320.

⁵ 2 Min. Insts. 504; 2 Bl. Com. 188; 1 Stephens, Com. 320.

fore, there is no *jus accrescendi*, or survivorship, between them; for each part descends severally to their respective heirs, though the unity of possession may continue. And as long as the lands continue in a course of descent, and are held promiscuously, so long are the tenants therein, whether male or female, called *parceners*.⁶

§ 769. Incidents of Estates in Parcenary—Enumeration. The incidents pertaining to an estate in coparcenary, for the most part, grow naturally out of its unities, and the manner in which it is held. They may be set forth in connection with the following heads, namely: (1) *Suing and being sued*; (2) the effect of entry by and possession of one coparcener as to the rest; (3) the liability of coparceners one to another, for trespass or waste; (4) the liability of coparceners to account, one to another, for profits; (5) modes whereby coparceners may convey, one to another; (6) liability to curtesy and dower; (7) compulsory partition.

§ 770. Same—1. Suing and Being Sued. Suits by or against parceners touching the right to the property descended to them must be joint; for, as they are together but one heir, they have, of course, but one freehold in the land, as long as it remains undivided. But this supposes that they are heirs to the same ancestor, although it may be in different degrees; for if coparceners be actually seised or entitled, and then die leaving issues, their issues shall not join in a *droiturel* action, because several rights descended to them from several ancestors; and yet, when they have severally recovered, they are coparceners, and then they may be sued for the land jointly. On the other hand, as their possession is joint, in the case supposed, any action possessory which shall be brought by them should be joint.⁷

§ 771. Same—2. Entry or Possession by One Parcener Enures to All. Entry by or possession of one coparcener is an entry by or possession of all, wherever they might sue jointly for the possession, because they are seised promiscuously *pro indiviso*; and hence, as we have seen, in the case of joint tenants and tenants in common, one coparcener cannot be disseised by his fellow, so as to justify an action of ejectment against him, without an actual ouster, or some other act amounting to a total denial of the plaintiff's right as co-tenant.⁸ A clear, positive and continued disclaim-

⁶ 2 Min. Insts. 504; 2 Bl. Com. 188; 1 Stephens, Com. 320; 1 Th. Co. Lit. 681, 683, 684, notes.

⁷ 2 Min. Insts. 505; 2 Bl. Com. 188; 1 Th. Co. Lit. 683, 684, note (G); Bac. Abr. Coparceners (B).

⁸ 2 Min. Insts. 505; 3 Th. Co. Lit. 51, 52; 1 Th. Co. Lit. 681, note (C); Gilbert, Ten. 29.

er of title, and the assertion of an adverse right brought home to the knowledge of the other coparceners, are indispensable to create such a disseisin or ouster, though great lapse of time, with other circumstances, may warrant the presumption of a disseisin or ouster by one of the parceners or other co-tenants.⁹

§ 772. **Same—3. Liability of Parceners to One Another for Trespass or Waste.** Coparceners are not liable, the one to the other, for trespass either at common law or by statute, for the reason just stated, namely, that each is rightfully entitled to the possession of the whole. As to waste, also, there was, at common law, no mutual responsibility, for the same reason; and in England the statute 13 Edw. I, c. 22, which subjected joint tenants and tenants in common to liability therefor, did not extend to coparceners, because, it was said, they could at any time compel partition, and might thus avoid any injury from that source.

In this country generally, a parcener is held liable to his co-tenants for injury to the inheritance in an action on the case in the nature of waste.

§ 773. **Same—4. Accounting for Profits.** At common law coparceners were not liable to such mutual accounting, unless the party receiving more than his share had been constituted by his fellows their bailiff or receiver; but this feature has been changed in terms, as to joint tenants and tenants in common, by the statute 4 Anne, c. 16, and it is believed to have been changed by construction as to parceners also, partly because equity had obliged them to render such an account prior to the statute of Anne, and partly from the irresistible reasonableness of the thing, and the force of the analogy of the case of joint tenants and tenants in common.¹⁰

§ 774. **Same—5. Modes Whereby Parceners may Convey to One Another.** While the estate remains undivided, coparceners are but one heir, and have one entire freehold in the land in respect to strangers, and therefore may convey their respective shares from one to another by release, like joint tenants. But to many purposes, as between themselves, they have in judgment of law several freeholds; and hence one of them may enfeoff another of his or her part, and make livery. So that, whilst joint tenants may re-

⁹ *Pillow v. Southwest Virginia Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

¹⁰ 2 Min. Insts. 506; 4 Kent, Com. 366, note (D); 1 Eq. Cas. Abr. 5; *Fry v. Payne*, 82 Va. 762, 1 S. E. 197; *Graham v. Graham*, 6 T. B. Mon. (Ky.) 562, 17 Am. Dec. 166; *O'Bannon v. Roberts*, 2 Dana (Ky.) 55, 56.

lease and not enfeoff, because the freehold is joint, and tenants in common may enfeoff and not release, because the freehold is several, coparceners may both release and enfeoff, because their seisin is, to some intents, joint, and to some several. Coparceners may also convey the one to the other by bargain and sale, etc., under the statute of uses.¹¹

§ 775. **Same—6. Liability to Curtesy and Dower.** Joint tenancy is not, at common law, liable to curtesy and dower, because of the doctrine of survivorship, whereby the consort's right to curtesy or dower, as the case may be, is anticipated and prevented. But tenancy in common, and estates in coparcenary, not being subject to survivorship, have always been deemed liable to those incidents. Dower is assigned, however, in all these cases where there is a plurality of tenants, undividedly as the husband held it, and not by metes and bounds.¹²

§ 776. **Same—7. Compulsory Partition.** Coparceners, coming to their estate by act of the law, were indulged by the common law with the privilege of coercing partition amongst themselves, which was denied to tenants in common and joint tenants, for the opposite reason, namely, that they came to their estates by act of the parties, and that, as their common interests were created by mutual consent, they ought to be dissolved only in like manner. Parceners, or coparceners, are so called because they are compellable to make partition.¹³

§ 777. **Modes of Terminating Tenancy in Coparcenary—1. In General.** An estate in coparcenary is dissolved by the severance of any one of its constituent unities. To sever the unity of interest or of title, as by one parcener aliening her share to a stranger, whilst the unity of possession is preserved, is to convert it into a tenancy in common, whilst if the unity of possession is dissolved the tenants hold in severalty; and it should be observed that an agreement to sever will have in equity the same effect as an actual severance of the unities.¹⁴

§ 778. **Same—2. One Parcener Transferring His Share to a Stranger.** If a parcener transfers his share to a stranger, the alienee is tenant in common with the other parceners; and, if there be more than two in the first instance, the others are still coparceners as before. A lease for years, nor, it is said, even a lease for life, does not sever the estate in coparcenary, although a lease for life

¹¹ 2 Min. Insts. 506, 507; 1 Th. Co. Lit. 683, note (F), 789.

¹² 2 Min. Insts. 507; 1 Th. Co. Lit. 691, note (L), 789, note (T).

¹³ 2 Min. Insts. 507; 2 Bl. Com. 189; 1 Th. Co. Lit. 678, 696, et seq.

¹⁴ 2 Min. Insts. 507, 478; 2 Bl. Com. 188, 189.

by a joint tenant is admitted to destroy the jointure; and it would seem that it should also operate a severance of the tenancy in coparcenary, by destroying both the unity of title and that of interest or estate.¹⁵

§ 779. Same—3. Union of All the Shares in the Hands of One Parcener. This may be by the several shares passing by descent to one of the coheirs, or by their being conveyed, by release, feoffment, or otherwise, to one who, in either event, is of course seised in severalty.¹⁶

§ 780. Same—4. Voluntary Partition by Mutual Consent. Partition between parceners may be proved at common law as well by parol, without deed, as by deed; and that not only as to lands that may pass by livery without deed, but also as to rents, commons, and the like, which lie in grant only. The reason seems to be that partition between parceners makes no degree, but leaves each parcener seised as by descent from the common ancestor, and it is, therefore, no conveyance.¹⁷

Hence, also, no deed was required for partition between coparceners (though their estate is one of inheritance) under the English statute of frauds,¹⁸ in which respect it differed radically from partitions of joint tenancies and tenancies in common.¹⁹

In several states a voluntary partition between coparceners is now, by statute, required to be made by deed; and it is obvious that this method is practically called for everywhere, in order that the transaction may be made a matter of record.

Partition amongst coparceners by consent is accomplished in various ways, of which Littleton mentions four specifically, and Coke others in general terms.²⁰

Those mentioned by Littleton are: (1) Mutual assignment amongst the coparceners themselves; (2) partition by a common friend, with first choice by the eldest; (3) partition made by the eldest parcener, he or she, in such case, taking the last choice; and (4) partition into shares, and assignment of the shares by lot.²¹

§ 781. Same—Voluntary Partition Implies a Warranty. Upon the eviction of one parcener by a title paramount from the share

¹⁵ 2 Min. Insts. 507; 1 Th. Co. Lit. 754 et seq., note (U).

¹⁶ 2 Min. Insts. 508.

¹⁷ 2 Min. Insts. 508; 1 Th. Co. Lit. 704, 692; Jones v. Carter, 4 Hen. & M. (Va.) 190.

¹⁸ 29 Car. II, c. 2; Nicholas v. Nicholas, 100 Va. 660, 42 S. E. 669, 866.

¹⁹ Ante, § 740.

²⁰ 1 Th. Co. Lit. 692 et seq., 695; 2 Bl. Com. 189.

²¹ 2 Min. Insts. 508 et seq.; 2 Bl. Com. 189.

assigned to him, the whole partition is defeated, and the evicted parcener is entitled to enter upon the shares of his fellow or fellows as if no partition had taken place; there being a warranty implied mutually between the parties that the possession and title to each share shall be guaranteed. And this proposition is true, though the eviction be only of part of the purparty allotted to one of them, or even of a part of the estate, or interest, provided it be a freehold estate. Thus, if there be two coparceners who make partition, and one of them be evicted of his purparty in whole or in part, or of an estate for life in his portion, the partition, by virtue of the implied warranty above described, is avoided in the whole.²²

But this doctrine supposes that the privity of estate between the coparceners still continues; for if one parcener alienes his or her share, and the alienee is evicted, the privity having been destroyed, there ceases to be any liability, by reason of the implied warranty, to make recompense, either to the alienee or to the parcener from whom he bought.²³

§ 782. **Doctrine of Hotchpot—1. At Common Law.** One of the most important incidents belonging to partition amongst coparceners is the doctrine of hotchpot, which, having belonged to a very early period of the common law, had almost grown out of use even in Lord Coke's time, but has been revived in England by the statutes of distributions, and greatly extended in the United States by our statutes of descents and distributions.²⁴

The best description of the doctrine, as it existed at common law, is to be drawn from Littleton's own words: "If a man seised of certain lands in fee simple hath issue two daughters, and the eldest is married, and the father giveth part of his lands to the husband with his daughter in frank marriage and dieth seised of the remnant, the which remnant is of a greater yearly value than the lands given in frank marriage. In this case neither the husband nor wife shall have anything for their purparty of the said remnant, unless they will put their lands given in frank marriage in hotchpot, with the remnant of the land, with her sister. And if they will not do so, then the youngest may hold and occupy the same remnant, and take the profits only to herself. And it seemeth that this word (hotchpot or hodgepodge) is, in English, a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behooveth in this case to put the lands given in frank marriage with the other lands

²² 2 Min. Insts. 511; 1 Th. Co. Lit. 716, 717, 720.

²³ 2 Min. Insts. 511, 512; 1 Th. Co. Lit. 718.

²⁴ 2 Min. Insts. 512; 2 Bl. Com. 190, 191.

in hotchpot (that is, to estimate their value in the division), if the husband and wife will have any part in the other lands."²⁵

§ 783. **Same—2. General Doctrine of Hotchpot in the United States.** The doctrine of hotchpot has been much enlarged in the United States, by statute, not only beyond the scanty limits of the common law, but also beyond the purview of the English statutes of distribution, 22 and 23 Car. II, c. 10, and 29 Car. II, c. 30. The intent with us is the same which more feebly animates the common law and the statutes of England just referred to, namely, to bring about, as nearly as may be, an equal division among the children or other descendants of a decedent of all his estate, both real and personal, except so far as, in the exercise of his right of ownership, he may have thought fit himself to create a difference; not by constraining a child who has received an advancement to submit to a redivision, bringing in what he has already received, but by subjecting him to the alternative of either doing so, or of foregoing any participation in what remains of the decedent's estate undisposed of by him.

The statutes are not aimed against the freedom of the owner of land or personalty to dispose of it as he may see fit. If he chooses by his will to give one child all of his property and to give the others nothing at all, or very disproportionate shares, there is nothing in the common law or in the American statutes to prevent him.

The principle on which all of these statutes seem to rest is that if any of the descendants of a decedent has received any part, real or personal, of his ancestor's estate during his lifetime, the same shall be brought into hotchpot. But in order to have this principle applied it must be shown that what the heir or distributee received in the lifetime of the ancestor was intended by the latter as an advancement; that is, as a part of the ultimate share of the heir or distributee. The statutes generally prescribe the evidence necessary to prove an advancement, and the rules are not uniform.²⁶

²⁵ 2 Min. Insts. 91, 512; 1 Th. Co. Lit. 720 et seq.; 2 Bl. Com. 190, 191.

²⁶ 4 Kent, Com. 418, 419; 3 Washburn, Real Prop. (6th Ed.) § 1865, and note; 2 Min. Insts. 512 et seq.; 1 Th. Co. Lit. 725; *Edwards v. Freeman*, 2 P. Wms. 444; *Kirkudbright v. Kirkudbright*, 8 Ves. 51; *Hatch v. Straight*, 3 Conn. 31, 8 Am. Dec. 152; *Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355.

DIVISION IV.

MODES OF ACQUIRING TITLE TO REAL PROPERTY.

§ 784. Preliminary Outline of Discussion.

785. Anomalous Case of Title by Escheat.

786. Title by Purchase and Descent Distinguished.

1. By Purchase at Common Law the Estate Acquires a New Heritable Quality.

787. 2. Purchaser Not Liable for Predecessor's Debts, as in Case of Descent.

§ 784. **Preliminary Outline of Discussion.** In the three preceding divisions of this work we have discussed the tenures whereby real property might be held; the several sorts of real property, as corporeal and incorporeal; and the various estates or interests, which one might have in real property, with their incidents. We now have reached the fourth and last division, in which we shall inquire into the various modes of acquiring title to real property.

Under this division of the subject, the first great classification, usually made, and which will be adhered to in this work, is into (1) title by descent and (2) title by purchase, which will constitute the two parts of this grand division.

Title by descent arises by act of the law, where land descends from ancestor to heir. Title by purchase (using the term "purchase" in a technical sense) arises where the title is vested by the parties' own act or agreement, as where land is acquired by conveyance, devise, contract to convey, dedication, adverse possession, etc.; it being immaterial for the purposes of this classification whether it be acquired gratuitously or for a price.²⁷

It will be observed that this analysis of the modes of acquiring title to real estate is not entirely exhaustive, since there are certain methods of acquiring title, which arise by operation of law, and which yet are not to be classed as instances of title by descent. Such are the life estates by the curtesy and in dower, which, however, have been fully treated elsewhere.²⁸

§ 785. **Anomalous Case of Title by Escheat.** Title by escheat also arises in part by act of the law, resembling descent in that the land passes without the owner's act or agreement; but it may also

²⁷ 2 Min. Insts. 522; 2 Bl. Com. 243, 201, note (2); 2 Th. Co. Lit. 156, note (D), 184, note (A).

²⁸ Ante, § 208 et seq., § 235 et seq.

be classified, and generally is, as a mode of title by purchase, in that the title is finally transferred to the state by escheat only after proceedings have been instituted by the state for that purpose. Title by escheat arises wherever land is left without any known owner, in which event it escheats to the state, through the medium of proceedings known as inquest of office and office found, or an analogous statutory proceeding.

Escheat occurred, at common law, in the following cases: (1) Where the owner of land dies intestate, leaving no person capable of succeeding to the estate as his heir, either leaving behind him no blood relation at all, or only such relatives as are incapable of taking as heirs by reason of illegitimacy, being of the half-blood only, or not being of the blood of the first purchaser, alienage, or attainder of treason or felony; or (2) where the owner of the estate is an alien, it seems that the land escheats at common law.²⁹ But, in the case of a dissolved corporation, an exception to this general principle was made at common law, and, though land were owned by such corporation in fee simple, it did not upon the dissolution escheat, but reverted to the donor or his heirs as a sort of quasi reversion.³⁰

In the United States, escheat occurs when the owner of an estate of inheritance in land dies intestate and without heirs. In this country the matter of inheritance is governed entirely by statute, so that the local statutes must in every case be consulted, not only to find who are the persons entitled to inherit by reason of relationship, but also to find how far the common-law disabilities of alienage and illegitimacy have been removed.³¹ The English doctrine of "corruption of blood" by reason of suicide or attainder of felony has never received any recognition.

§ 786. Title by Purchase and Descent Distinguished—1. By Purchase at Common Law the Estate Acquires a New Heritable Quality. Land acquired by purchase becomes descendible, at common law, to the new owner's blood in general, as if it were a feud which had existed in his family from times of indefinite antiquity,

²⁹ 2 Min. Insts. 548 et seq.

³⁰ 2 Min. Insts. 557; 2 Bl. Com. 256; 1 Th. Co. Lit. 195, 196; Angell & Ames, Corp. § 195. The modern doctrine, however, is that, upon the dissolution of a corporation, it nevertheless, in contemplation of law, still continues to exist for the purpose of disposing of its property, real and personal, collecting and paying its debts, and distributing the residue amongst its shareholders. 2 Min. Insts. 557, 558; Broughton v. Pensacola, 93 U. S. 268, 23 L. Ed. 896; Meriwether v. Garrett, 102 U. S. 512, 26 L. Ed. 197; State v. President, etc., of Bank of Tennessee, 5 Baxt. (Tenn.) 101.

³¹ 2 Reeves, Real Prop. § 997 et seq.

whereby it becomes inheritable by his heirs general, first of the paternal, then of the maternal, line; whereas land acquired by descent can, at common law, pass to those heirs only who are of the blood of the first purchaser, that is, of the blood of that ancestor from whom he derives the land by descent.³²

§ 787. **Same—2. Purchaser Not Liable for Predecessor's Debts, as in Case of Descent.** An estate taken by descent subjects the heir at common law to pay (so far as the value of the land extends) all the debts of the ancestor due by any contract of record (e. g., a judgment or recognizance), or by any contract of specialty, that is, under seal, which expressly binds the heirs. On the other hand, when the land comes by purchase, it is not charged with the preceding owners' debts, except in so far as it may be subject to the lien of a mortgage or judgment, etc., or where he takes as a volunteer, that is, without consideration.³³

This diversity prevails even more extensively in the United States than at common law, because with us a man's lands in the hands of his heir are liable to pay, not alone his debts of record and of specialty binding the heirs, but all of his debts of every description, but only after the personal estate, not specifically bequeathed, has been exhausted.³⁴

³² 2 Min. Insts. 522; 2 Bl. Com. 201, 243; 2 Th. Co. Lit. 185, 186, note (A).

³³ 2 Min. Insts. 522, 523; 2 Bl. Com. 201, note (2), 243; 2 Th. Co. Lit. 185, 186, note (A); *Piper v. Douglas*, 3 Grat. (Va.) 372, 373.

³⁴ 2 Min. Insts. 523.

PART I.

TITLE BY DESCENT.

- § 788. Nature of Title by Descent.
- 789. Theory of Kindred, Lineal and Collateral.
- 790. Modes of Measuring Degrees of Relationship.
 - I. Lineal Consanguinity.
- 791. II. Collateral Kindred.
 - 1. Rule of Canon Law.
 - 792. 2. Rule of the Civil or Roman Law.
 - 793. 3. Rule of the Common Law—Same as the Canon Law.

§ 788. **Nature of Title by Descent.** Descent, or hereditary succession, is the title whereby one, on the death of his ancestor, acquires the ancestor's estate in real property, by right of representation as his heir at law. An heir, therefore, is that person of the kindred of a decedent upon whom the law casts the estate in real property immediately on the death of such decedent; and such estate so descending to the heir is called the inheritance.³⁵

§ 789. **Theory of Kindred, Lineal and Collateral.** Kindred includes those persons related to one by marriage, or affinity, as well as by blood, or consanguinity; but as the common law always, and the statute of descents with us, with rare exceptions, selects the heir from the kindred by blood or consanguinity (that is, those descended from a common ancestor), what is to be said is mainly applicable to the latter.³⁶

Consanguinity is either lineal or collateral. Lineal consanguinity is the relationship that subsists between persons of whom one is descended directly from the other; such, for example, as that between father and son, grandfather and grandson, etc.³⁷

Collateral consanguinity is that relationship which subsists between persons who are descended from the same common ancestor, but not one from the other, such as that between brothers, between uncle and nephew, between cousins, etc.³⁸

§ 790. **Modes of Measuring Degrees of Relationship—I. Lineal Consanguinity.** In the direct line (that is, in the line of lineal consanguinity), every generation, reckoning either upwards or downwards, constitutes a degree, and this mode of reckoning degrees in

³⁵ 2 Min. Insts. 523; 2 Bl. Com. 201.

³⁶ 2 Min. Insts. 523, 524; 2 Bl. Com. 202.

³⁷ 2 Min. Insts. 524; 2 Bl. Com. 203.

³⁸ 2 Min. Insts. 524; 2 Bl. Com. 204.

the direct line universally obtains, as well in the civil as in the canon and common law.³⁹

§ 791. II. Collateral Kindred—1. Rule of Canon Law. The canon law reckons from the common ancestor down to the more remote party. Thus brothers are related, by the canon law mode of computation, in the first degree, first cousins in the second, second cousins, and also third, in the third degree, and fourth cousins in the fourth.⁴⁰

§ 792. Same—2. Rule of the Civil or Roman Law. The civil law reckons from one party up to the common ancestor, and then down to the other.

Thus, by the civil law computation, brothers are related in the second degree, first cousins in the fourth, second cousins in the fifth, third cousins in the sixth, and fourth cousins in the seventh.⁴¹

§ 793. Same—3. Rule of the Common Law—Same as the Canon Law. The canon law reckons degrees of consanguinity with a view to determine the validity of marriages, and so it has reference to the amount of common blood which the parties have. The civil law adopts its computation with a view to the distribution of estates, and, therefore, it looks to the proximity or remoteness of the parties in respect to one another. Seeing that the common and civil law have the same object, it might have been expected that the common law would have adopted the computation of the civilians, rather than that of the canonists. We shall see, however, that the common law, in the disposition of inheritances, has a chief regard to the blood of the first purchaser, who for the most part is the common ancestor, so that proximity to him is of more importance than proximity of the parties one to another.⁴²

³⁹ 2 Min. Insts. 524.

⁴⁰ 2 Min. Insts. 524; 2 Bl. Com. 206.

⁴¹ 2 Min. Insts. 524; 2 Bl. Com. 207.

⁴² 2 Min. Insts. 525; 2 Bl. Com. 224, 225.

CHAPTER XXXII.

TITLE BY DESCENT AT COMMON LAW.

- § 794. Subject-Matter of Descent at Common Law.
795. Doctrine of *Possessio Fratris* at Common Law.
796. Distinction between Heirs Apparent and Heirs Presumptive.
797. Common-Law Canons of Descent—Primary and Secondary Canons.
798. Canon I—Inheritances shall Lineally Descend in Infinitum to the Issue of the Person Who Last Died Actually Seised, but shall Never Lineally Ascend.
799. Canon II—The Male Issue shall be Admitted before the Female.
800. Canon III—Of Two or More Males in Equal Degree the Eldest Only shall Inherit, but the Females All Together.
801. Canon IV—The Lineal Descendants in Infinitum of Any Person Deceased shall Represent Their Ancestor; That is, shall Stand in the Same Place as the Person Himself, had He been Living.
802. Canon V—On Failure of Lineal Descendants or Issue of Person Last Seised, the Inheritance shall Descend to His Collateral Relatives, Being of the Blood of the First Purchaser, Subject to Canons II, III and IV.
803. Canon VI—The Collateral Heir of Person Last Seised must be His Next Collateral Kinsman of the Whole Blood.
804. Canon VII—In Collateral Inheritances, the Male Stock shall be preferred to the Female (That is, Kindred Derived from the Male Ancestors, However Remote, shall be Admitted before Those Derived from the Females, However Near), unless the Land has in Fact Descended from a Female.
805. Title by Descent in the United States.

§ 794. **Subject-Matter of Descent at Common Law.** The subject-matter of descent at common law embraces only estates of inheritance in real property, where the ancestor from whom the descent is claimed died actually seised of the inheritance at the time of his death. The law casts the inheritance upon the heir immediately upon the ancestor's death; but it is merely a seisin in law, which will not enable him, at common law, to transmit the inheritance to his heirs. His ownership becomes complete for all purposes only by an actual corporal entry, either by himself or by his agent or tenant.¹

§ 795. **Doctrine of *Possessio Fratris* at Common Law.** The heir's ownership becomes complete, as just explained, only by the actual corporal entry of the heir himself, or of his agent or tenant in his behalf.²

¹ 2 Min. Insts. 525; 2 Bl. Com. 201, note (4), 208.

² 2 Min. Insts. 525; 2 Bl. Com. 201, note (4).

Hence comes the doctrine of *possessio fratris facit sororem esse hæredem*, or as it is commonly called, the doctrine of *possessio fratris*, which is where a man has a son and daughter by one wife, and a son by a second wife, and dies seised of an inheritance. If the older son does not actually enter upon the premises, but dies before such entry, the younger son succeeds, as heir to his father, the person who died last actually seised. But if the older son enters before his death and dies actually seised, the younger son, being of the half blood to him, cannot, at common law, be his heir and, therefore, the sister succeeds *possessione fratris*.³

§ 796. **Distinction between Heirs Apparent and Heirs Presumptive.** No person can be the actual, complete heir of another, until the ancestor is dead. *Nemo est hæres viventis*. Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive; apparent when the right of inheritance is indefeasible (that is, by the birth of any nearer relation), provided he outlives the ancestor, as the eldest son; and presumptive when, if the ancestor should die at the moment, the person would, in the present circumstances of things, be the heir, but whose right to inherit may be defeated by the contingency of some nearer heir being born, as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child.⁴

And this divestment of the inheritance may, at common law, occur after the estate has actually descended by the death of the owner to such presumptive heir. Nay, the divestment may occur repeatedly in the same case. Thus, if one die seised of land, leaving as his next of kin a father and mother, and a sister of the father, inasmuch as inheritances cannot lineally ascend, the sister shall be, by the common law, his heir presumptive, and may actually succeed to the possession of the inheritance. But the subsequent birth, at any distance of time, of a brother to such female heir, will divest the estate out of her, and he, the decedent's uncle, may lose it to an afterborn sister of decedent, from whom it may be divested by the subsequent birth of a brother, in whom it finally vests as heir apparent.⁵

§ 797. **Common-Law Canons of Descent—Primary and Secondary Canons.** The canons of descent at common law, as enumerated by Blackstone, are seven, of which five are devoted to determine the persons who are to take as heirs, and the shares wherein they are to take, and may therefore be called primary canons; and the

³ 2 Min. Insts. 525; 2 Bl. Com. 224, 227, note (28).

⁴ 2 Min. Insts. 525, 526; 2 Bl. Com. 207.

⁵ 2 Min. Insts. 526; 2 Bl. Com. 208, note (9).

remaining two are employed as auxiliary, in order to ascertain the application of the former, and so may be denominated secondary canons. The primary canons, as they assign the inheritance to the lineal descendants, or to collateral kindred of the decedent, may again be subdivided, accordingly, into such canons as relate to the lineal kindred as heirs and such as relate to the collateral kindred as heirs.

All these canons savor more or less of feudal policy, in which they doubtless originated, and some of them are warranted by no other than feudal considerations. It is, therefore, remarkable that all of them were adhered to with tenacity (although several of them had for ages become unadapted to the existing state of English society) until 1834, when, by statutes 3 & 4 Wm. IV, c. 106, followed, in 1859, by 22 & 23 Vict. c. 35, material innovations were introduced.⁶

§ 798. **Canon I—Inheritances shall Lineally Descend in Infinitum to the Issue of the Person Who Last Died Actually Seised; but shall Never Lineally Ascend.** This canon implies, it will be observed, that the ancestor must be actually dead before the inheritance can take effect, which is in accordance with the maxim, "*Nemo est hæres viventis.*" It implies, secondly, that the ancestor must have had actual seisin in fee simple of the lands by his own entry, or by the possession of his or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold, or in case of an incorporeal hereditament, by what is equivalent to corporeal seisin, such as the receipt of rent, the enjoyment of a way or common, etc. And, thirdly, it implies that the ancestor was so seised at his death; the law requiring this notoriety of possession at that time, as evidence that the ancestor had that property in himself which is now to be transmitted to his heir. This seisin of any person, at his death, makes him the root or stock whence all future inheritance, by right of blood, must be derived, which is very briefly expressed in the maxim, "*Seisina facit stipitem.*"⁷

This rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason that the possessions of parents should, upon their decease, if transmissible at all, go in the first place to their children and descendants. But the negative branch, which excludes parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to the common law of

⁶ 2 Min. Insts. 526, 527; 2 Bl. Com. 240.

⁷ 2 Min. Insts. 527; 2 Bl. Com. 207 et seq.; 2 Th. Co. Lit. 164, 177, et seq.
182.

England, and to those countries whose jurisprudence is tinged with the policy of feuds. It is an express rule of the feudal law, that successions *feudi talis est natura, quod ascendentes non succedunt*. Henry I, indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line; but in the time of Henry II, Glanvil lays it down as established law that *hereditas nunquam ascendit*, which until 1834 remained an invariable maxim.⁸

These circumstances evidently show the negative part of the rule, at least, to be of feudal origin; and, so viewed, it seems to have been in its origin not wholly an unreasonable doctrine. For if the feud of which the son died seised was really *feudum antiquum*, or one derived to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son, unless it were *feudum maternum*, or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known rule of the early feudal constitutions, which was founded as well upon the personal merit of the vassal, which might be transmitted to his children, but could not ascend to his progenitors, as also upon the consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if the *feudum novum* were held by the son (as in practice it commonly was), *ut feudum antiquum*, or with all the qualities annexed to a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an ancient feud, and, therefore, could not go to the father, because, if it had been an ancient feud, the father must have been dead before it could have come to the son. Thus, whether the feud was strictly *novum*, or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases could the father possibly succeed.⁹

But, as Mr. Christian (in his notes to Blackstone) observes, there is not an entire consistency in applying these rules; for, if the father does not succeed to the estate because it must be presumed that it

⁸ 2 Min. Insts. 528.

⁹ 2 Min. Insts. 528. These reasons, drawn from the history of feuds, are certainly more satisfactory than the very quaint one of Bracton (Lib. III, c. 29), adopted by Lord Coke (2 Th. Co. Lit. 162, 163), which regulates the descent of lands according to the laws of gravitation, "*Descendit itaque jus, quasi ponderosum quod cadens deorsum recta linea, et nunquam reascendit.*"

has passed him in the course of the descent, the same reason ought to prevent an elder brother from inheriting from the younger. And if it does not pass to the father, lest the lord should have the services of a decrepit feudatory, the same principle should a fortiori exclude the father's eldest brother from the inheritance. Yet the elder brother is permitted to succeed to the younger, and the uncle, although older than the father, to the nephew.¹⁰

§ 799. **Canon II—The Male Issue shall be Admitted before the Female.** The preference of males to females is agreeable to the law of succession amongst the Jews, and also amongst the Athenians, but was unknown to the laws of Rome, which made no distinction between brothers and sisters. The reason of the preference by the common law is deduced from feudal principles; for by the genuine and original policy of that constitution no female could ever succeed to a proper feud, being incapable of performing those military services for the sake of which that system was established. The common law, however, does not extend to a total exclusion of females, like the Salic law and others. It only postpones them to males of the same degree.¹¹

§ 800. **Canon III—Of Two or More Males in Equal Degree the Eldest Only shall Inherit, but the Females All Together.** The Jews allowed some, although not an exclusive, advantage to primogeniture, giving to the eldest son a double portion of the inheritance. The Greeks, Romans, Britons, Saxons, and even originally the Feudists, divided the lands equally; some among all the children at large, and some among the males only. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible, or (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was further enforced by the inconveniences that attend the splitting of estates, namely, the division of military services, the multitude of infant tenants incapable of performing any duty, the consequent weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and to the public, by engaging in mercantile, military, civil or ecclesiastical employments. These reasons occasioned an almost total change in the method of feudal inheritance on the continent of Europe, so that the eldest male began universally to succeed to the whole of the lands in

¹⁰ 2 Min. Insts. 529; 2 Bl. Com. 211, 212, note (13). See 2 Th. Co. Lit. 163, note (8); Ratcliffe's Case, 3 Co. 40.

¹¹ 2 Min. Insts. 530; 2 Bl. Com. 213, 214.

all military tenures; and in this condition the feudal constitution was established in England by William the Conqueror.¹²

Socage estates, however, are mentioned by Glanvil, in the reign of Henry II, as frequently descending to all the sons equally. But in the time of Henry III we find by Bracton that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, according to this third canon, except in the county of Kent, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal incident was a joint inheritance of all the sons, and except, also, in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.¹³

The succession of females was left as by the ancient law, subject to an equal division, for they were all alike incapable of military service, and therefore, one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest; and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown, wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to dignities and titles of honor descended on females.¹⁴

§ 801. Canon IV—The Lineal Descendants in Infinitum of Any Person Deceased shall Represent Their Ancestor; That is, shall Stand in the Same Place as the Person Himself, had He been Living. This taking by representation is called succession in stirpes, or per stirpes, according to the roots, since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner, also, was the Jewish succession directed; but the Roman law somewhat differed from it. In the descending line the right of representation continued in infinitum, and in all cases the inheritance always descended in stirpes. Thus, if one of three daughters died leaving ten children, and then the father died, the two surviving daughters had each one-third of his effects, and the ten grandchildren had the remaining third divided between them; and so, if all the daughters had died before the father, leav-

¹² 2 Min. Insts. 530; 2 Bl. Com. 214, 215.

¹³ 2 Min. Insts. 531; 2 Bl. Com. 215, 216.

¹⁴ 2 Min. Insts. 531; 2 Bl. Com. 215, 216.

ing respectively ten, six, and two children, the estate would have been divided into three parts, going per stirpes to the offspring of each daughter.¹⁵

But amongst collaterals, according to the Roman law, representation had no place, unless the persons succeeding to the inheritance were of unequal degree. Thus, if any person of equal degree with the persons represented were still subsisting (as if the deceased left one brother and two nephews, the sons of another brother), the succession was guided still by the roots; but if both brethren were dead, leaving issue, then their representatives in equal degree became themselves principals, and shared the inheritance per capita, that is, share and share alike, they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation. So if the next heirs of J. S. be six nieces, three by one sister, two by another, one by a third, his inheritance by the Roman law was divided into six parts, and one given to each of the nieces; whereas the common law in this case would still divide it only into three parts, and distribute it per stirpes, thus: One-third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.¹⁶

The common-law mode of representation is the necessary consequence of the double preference which that law gives first to the male issue, and next to the first-born among the males, to both of which the Roman law is a stranger. For if all the children of three sisters were in England to claim per capita, in their own right as next of kin to the ancestor, without any respect to the stocks whence they sprung, and those children were partly male and partly female, then the eldest male among them would exclude, not only his own brethren and sisters, but all the issue of the other two daughters.¹⁷

§ 802. Canon V—On Failure of Lineal Descendants or Issue of Person Last Seised, the Inheritance shall Descend to His Collateral Relatives, Being of the Blood of the First Purchaser, Subject to Canons II, III, and IV. This rule, so far as it pays regard to the blood of the first purchaser, is purely of feudal origin. It was entirely unknown among the Jews, Greeks, and Romans, none of whose laws looked any further than the person himself who died

¹⁵ 2 Min. Insts. 531; 2 Bl. Com. 217, 218.

¹⁶ 2 Min. Insts. 532; 2 Bl. Com. 217, 218; Justinian's Insts. III, 1. 6.

¹⁷ 2 Min. Insts. 532; 2 Bl. Com. 217 et seq.

seised of the estate, but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it.¹⁸

When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of—that is, lineally descended from—the first feudatory or purchaser. In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; not even to his brother, because he was not descended from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. The true feudal reason for which rule was this: That what was given to a man for his personal service and personal merit ought not to descend to any but the heirs of his body, because it was supposed that none else would be so likely to succeed to the personal qualities which induced the original grant. And, therefore, in the feudal donation the word “heirs” extended only to the descendants from the first vassal, the will of the donor, or original lord (when feuds began to turn from life estates into inheritances),¹⁹ not being to make feuds absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo*; not hereditary to the collateral relations, or lineal ancestors, or husband or wife of the feudatory, but to the issue descended from his body only.²⁰

However, in process of time, when the feudal rigor was in part abated, a method was invented to let in the collateral relations of a grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*, that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even in *infinitum*, because they might have been of the blood of—that is, descended from—the first imaginary purchaser. For since in such general grants it is not ascertained whether the feud shall be held *ut feudum paternum*, or *ut feudum maternum*, but *ut feudum antiquum* merely, that is, as a feud of indefinite antiquity, the law will not ascertain from which of the ancestors of the grantee the land shall be supposed to have descended; and, therefore, it admits any of his collateral kindred (who have the other requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.²¹

¹⁸ 2 Min. Insts. 532.

¹⁹ Ante, § 139; 2 Min. Insts. 67, 68.

²⁰ 2 Min. Insts. 533.

²¹ 2 Min. Insts. 533.

Of this nature are all the grants of fee simple estates in England; for there is now no such thing in law as the grant of a feudum novum, to be held ut novum, unless in case of a fee tail, where the rule is strictly observed, and none but the lineal descendants of the donee in tail are admitted; but every grant of lands in fee simple in England is a feud whose antiquity is indefinite, and, therefore, any of the collateral kindred of the grantee are capable of being called to the inheritance.

Yet, when an estate has really descended in a course of inheritance, the common law observes the strict feudal rule, and admits none but the heirs of those through whom the inheritance has passed; for all others have demonstrably none of the blood of the first purchaser in them.

The great and general principle, then, upon which the common law touching collateral inheritance depends, is this: That upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have, originally descended.²²

The two remaining rules of inheritance are only rules of evidence, calculated to aid in investigating the question of who the purchasing ancestor was, which in feuds vere antiquis has in process of time been forgotten, and is supposed to be in feuds that are held ut antiquis. These rules may therefore be denominated secondary canons.²³

§ 803. **Canon VI—The Collateral Heir of Person Last Seised must be His Next Collateral Kinsman of the Whole Blood.** The heir must be (1) the next collateral kinsman, either personally or jure representationis, the proximity being reckoned according to the canonical degrees of consanguinity before mentioned;²⁴ and (2) he must be at common law of the whole blood, that is, descended not only from the same ancestor, but from the same couple of ancestors.²⁵

The total exclusion of the half blood from the inheritance is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule to carry into execution the fifth canon, which requires that the inheritance shall continue in the blood of the first purchaser.²⁶

A collateral relative of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally

²² 2 Min. Insts. 533, 534; 2 Bl. Com. 221 et seq.

²³ 2 Min. Insts. 534; 2 Bl. Com. 223, 224.

²⁴ Ante, §§ 791, 793.

²⁵ 2 Min. Insts. 534, 535.

²⁶ 2 Min. Insts. 535.

the ancestors of the *propositus* also, and those of the *propositus* are vice versa his. He, therefore, is very likely to be derived from that unknown ancestor of the *propositus* from whom the inheritance descended. But a kinsman of the half blood has but one-half of his ancestors above the common stock, the same as those of the *propositus*, and therefore there is not the same probability of that requisite of the common law, that he be derived from the blood of the first purchaser.²⁷

This is doubtless the best reason that can be given for this exclusion of the half blood, but it must be admitted to be very far from satisfactory. In the first place, it does not justify the peremptory and total exclusion of the half blood, but only its postponement; and, next, it neglects the obvious consideration, that there is or may be a greater probability that a nearer kinsman of the half blood is derived from the blood of the first purchaser than a more remote kinsman of the whole blood.²⁸

§ 804. **Canon VII—In Collateral Inheritances, the Male Stock shall be Preferred to the Female (That is, Kindred Derived from the Male Ancestors, However Remote, shall be Admitted before Those Derived from the Female, However Near), unless the Land has in Fact Descended from a Female.** This, also, is an auxiliary canon, or mere rule of evidence founded upon Canon V, which insists upon collateral kinsmen, in order that they may be heirs, being of the blood of the first purchaser; for if it is not known whether the inheritance came by the male or female line of ancestors, it is probable that it came by the male, because in the descending line, by Canon II, males are preferred to females. In the absence, therefore, of any contrary proof, the first purchaser and his blood are more likely to be found amongst the male than the female stocks.²⁹

§ 805. **Title by Descent in the United States.** Mr. Washburn says that "the system of rules, developed under the feudal notions of the Middle Ages, though maintained for so many ages in the mother country, were not in accordance with the genius and condition of her colonies in this country; and at an early period in their history important departures from these canons [of the common law] were made in the progress of their legislation. When the colonies became states, each had its own system of rules for the government of property within its limits, some of them varying essentially from those of the others, and all from the English common law. * * * A statement of the early canons of the Eng-

²⁷ 2 Min. Insts. 535; 2 Bl. Com. 224, 227, 228, note (29).

²⁸ 2 Min. Insts. 535; 2 Bl. Com. 227, 228, note (29).

²⁹ 2 Min. Insts. 535, 536; 2 Bl. Com. 235, 236; Williams, Real Prop. 120.

lish law of descent is necessary, however, in order to understand the propositions and illustrations made by legal writers, and to appreciate the changes resulting from recent legislation both in England and in this country.”³⁰

Owing to a lack of uniformity in the statutes of descents in the various states, it is impossible to give here a statement of the American law on the subject. Each statute must be studied by itself, and must be construed in the light of common-law rules.

§ 3 Washburn, Real Prop. (6th Ed.) § 1834.

(619)

PART II.

TITLE BY PURCHASE.

§ 806. **Distinguished from Title by Descent.** Many and various are the forms of purchase by which one may acquire the legal or equitable title to real property, using the word "purchase" in the technical sense, before explained,⁸¹ as embracing all the modes of acquiring property by the act or agreement of the parties, in contradistinction to title acquired by mere operation of law. Thus "purchase" stands in direct opposition to descent (as well as dower, curtesy and escheat, all of which arise to a greater or less extent by operation of law), and includes every other method of coming to an estate, as by gift, devise, adverse possession, occupancy, etc., as well as by conveyance for value.⁸²

⁸¹ Ante, § 784.

⁸² 2 Min. Insts. 547; 2 Bl. Com. 241; 2 Th. Co. Lit. 184.

CHAPTER XXXIII.

TITLE BY OCCUPANCY.

§ 807. Nature of Title by Occupancy.

808. Occupancy at Common Law either General (or Common) or Special.

809. No General Occupancy of Incorporeal Hereditaments.

810. General Occupancy in the United States.

§ 807. **Nature of Title by Occupancy.** Title by occupancy arises from the actual taking of possession of property which before belonged to no one, although capable of being appropriated. It may be expected that instances of such title will, in any well-ordered state, be very rare; for, as it cannot but be unpropitious to the general tranquillity of society to have in its midst subjects of property liable to be seized by the first taker, pains will generally be used to appoint by law a definite owner for every such subject. Accordingly, the right of occupancy, so far as it concerns real property, is confined by the common law within a very narrow compass, and by statutes, as well in this country as in England, has become well-nigh, if not totally, extinct.¹

The common law extends the right by occupancy to but a single instance, namely, where a man is tenant *pur auter vie* (by a grant to him for the life of another), and dies during the life of *cestui que vie*; that is, of him for whose life the land is holden. In this case he that can first enter into the land may, by right of occupancy, lawfully retain the possession, so long as *cestui que vie* lives. For it does not revert to the grantor, who cannot claim against his own deed; it does not escheat to the lord, for all escheats are of the entire fee simple, and not of particular estates carved out of it; it does not belong to the grantee, because he is dead; nor does it descend to his heirs, because it is not an estate of inheritance; nor vest in his personal representatives, for personal representatives never succeed to a freehold. Belonging, therefore, to nobody, the common law leaves it open to be seized and appropriated by the first person that can enter upon it, during the life of *cestui que vie*, under the name of an occupant.²

§ 808. **Occupancy at Common Law either General (or Common) or Special.** There are at common law two species of occupancy: (1) General or common occupancy; and (2) special occupancy.

Where an estate *pur auter vie* is not limited to the grantee's heirs (e. g., grant to A., for life of Z.), and the grantee dies, living

¹ 2 Min. Insts. 560; 2 Bl. Com. 258.

² 2 Min. Insts. 560; 2 Bl. Com. 258, 259.

the *cestui que vie*, any person who can first get possession of the land, after the death of the tenant, is entitled to hold it during the *cestui que vie*'s life, by common or general occupancy.³

Where an estate *pur auter vie* is limited to the grantee and his heirs (e. g., grant to A. and his heirs for life of Z.), and the grantee dies, living Z., the heir of the tenant (in order to avoid the mischiefs incident to common occupancy) is allowed, at common law, to enter and hold possession, not, indeed, as heir (for the estate is not one of inheritance), but as special occupant.⁴

§ 809. No General Occupancy of Incorporeal Hereditaments. It is worthy of observation that at common law there can be no common occupancy of incorporeal hereditaments, such as rents, commons and the like, because such subjects admitted of no actual entry or corporal seisin. And therefore, where a rent was granted to A. during the life of B., and A. died, living B., the rent was held to be entirely determined. For, the grant being made to A. only, when he died no one could claim it as occupant, because there could be no entry upon it; nor could any claim it under the deed, because it was limited to the grantee only. And so, as no one could take it under the grant, the rent ceased.⁵

But if the rent had been granted to A. and his heirs, during the life of B., and A. died, living B., his heirs would take as special occupants; for though in point of property the rent is not capable of occupation, yet since the heirs were expressly included in the grant, and they are capable of taking the freehold as representatives of the grantee, it is but reason that the rent should not determine while any person comprised in the grant is capable of taking.⁶

§ 810. General Occupancy in the United States. The doctrine of general occupancy was abolished in England by the statutes 29 Car. II, c. 3, and 14 Geo. II, c. 20, by which the tenant was permitted to devise the estate; but, if it were not devised, it became assets to be administered with the personalty.

There appears to be a tendency in this country to follow the policy of the English statutes; but in some states this estate, on the death of the tenant, is treated as an estate of inheritance and passes according to the statute of descents.⁷

³ 2 Min. Insts. 561; 2 Bl. Com. 259. ⁴ 2 Min. Insts. 561; 2 Bl. Com. 259.

⁵ 2 Min. Insts. 561; Bac. Abr. Estate for Life, (B), 3; Bowles v. Poore, Cro. (Jac.) 282; Hassell v. Gowthwaite, Willes, 505; Rawlinson v. Duchess of Montague, 3 P. Wms. 264, n. (D); Bearpark v. Hutchinson, 7 Bing. 178.

⁶ 2 Min. Insts. 562; Bac. Abr. Estate for Life, (B), 3; Bowles v. Poore, Cro. (Jac.) 282.

⁷ 1 Washburn, Real Prop. (6th Ed.) § 235, note.

CHAPTER XXXIV.

TITLE BY ACCRETION.

- § 811. Various Sorts of Accretion.
- 812. Title by Accretion Generally.
- 813. Title by Alluvion and Reliction.
- 814. Same—Apportionment of Alluvion.
- 815. Avulsion.
- 816. Islands Newly Formed.

§ 811. **Various Sorts of Accretion.** An accretion is an addition to land already held by an owner, caused by the action or erosion of water, producing changes of the water line more or less rapid, ranging from the imperceptible additions of alluvial deposits to the changes made in a night by flood or freshet, resulting in a river cutting out for itself a new bed, or the sweeping away of a considerable body of land intact by a powerful current or eddy.

There are at least four cases of such changes wrought by the action of water, which the law recognizes, namely, the four heads last enumerated in the preceding section.

When the change is a very gradual one, and is caused by the addition of soil to the existing land, deposited by the water, it is known as alluvion; and if such increase of the land is due to the gradual shrinking away of the water, it is known as reliction or dereliction.¹

On the other hand, if the change is sudden, as in case of a flood or freshet, and the identity of the land remains, notwithstanding its changed boundaries or altered location, this is known as avulsion, and gives rise to no change in ownership.²

If the change is not sudden, nor yet so gradual and imperceptible as to make it a case of alluvion or reliction, it is generally known by the generic name of accretion, and is governed by other principles than are applied in either of the first two cases.³ The case of islands newly formed usually belongs to this class of accretions, though not always.⁴

§ 812. **Title by Accretion Generally.** If the increment be not sudden and capable of identification, on the one hand, nor yet so gradual and imperceptible as to constitute alluvion or reliction, on the other, the general rule is that the increment belongs to the owner of the bed of the stream or water in which it is formed. In public (that is navigable) waters, including at common law the sea,

¹ Post, § 813.

² Post, § 815.

³ Post, § 812.

⁴ Post, § 816.

and all waters in which the tide ebbs and flows, and in the United States all waters which are actually navigable for vessels employed in commerce, say those of twenty tons burden and upwards, the commonwealth, or in England the crown, is the proprietor of the bed, and therefore to the commonwealth (or in case of the open sea, in close proximity to the coast, perhaps to the United States), and in England to the crown, belong such accessions. In private waters, on the other hand, the bed belongs to one or other, or to both, of the adjacent riparian proprietors, and such accessions belong to him.⁵

§ 813. **Title by Alluvion and Reliction.** Alluvion is the gradual and imperceptible increase of land annexed to the shore of the sea or any other water, and the doctrine applicable thereto, as well as to the corresponding case of land left bare by the gradual and imperceptible receding or reliction of the water, is that the soil belongs to the proprietor of the adjacent land which is thus extended. In order that this doctrine may prevail, the gain, whether by alluvion or by reliction, must be by little and little, by small and imperceptible degrees; i. e., by a progress not perceptible. For *de minimis lex non curat*, and besides these riparian owners being often losers by the breaking in or incursions of the water, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible loss or charge.⁶ And the fact that the riparian owner who claims the accretion is a corporation does not prevent the title by alluvion from arising.⁷

Thus, if a private stream, bounded on both sides by land belonging to A. (who would therefore own also the bed of the stream), should very gradually change its course so as to encroach on land belonging to B., the land thus covered by the stream in its new

⁵ Ante, § 56; 2 Min. Insts. 20 et seq., 563; 2 Bl. Com. 261 et seq., note (6); 3 Kent, Com. 428. See *Hayes v. Bowman*, 1 Rand. (Va.) 417; *Mead v. Haynes*, 3 Rand. (Va.) 33; *Home v. Richards*, 4 Call (Va.) 441, 2 Am. Dec. 574; *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 245; *The King v. Lord Yarborough*, 3 B. & Cr. 91; *Scratten v. Brown*, 4 B. & Cr. 485; *In re Hull*, etc., *Railway*, 5 M. & W. 331; *Abbot of Ramsay's Case*, 3 Dy. 326b; *The King v. Smith*, 2 Dougl. 444; *People v. Kirk*, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 289, note; *Coulthard v. Stevens*, 84 Iowa, 241, 50 N. W. 983, 32 Am. St. Rep. 307, note.

⁶ 2 Min. Insts. 563; 2 Tiffany, Real Prop. § 453; Gould, Waters, § 155; *In re Hull*, etc., *Railway*, 5 M. & W. 327; *Chesapeake & O. R. Co. v. Walker*, 100 Va. 82, 40 S. E. 633, 914; *East Hampton v. Kirk*, 84 N. Y. 218, 38 Am. Rep. 505; *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; *Warren v. Chambers*, 25 Ark. 120, 91 Am. Dec. 538, 4 Am. Rep. 23; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 277 et seq., note.

⁷ *Chesapeake & O. R. Co. v. Walker*, 100 Va. 82 et seq., 40 S. E. 633, 914.

bed ceases to belong to B., and becomes the property of A.⁸ And so, if A. should own only one side of the stream, which would bring his boundary to the middle of the stream,⁹ the middle line of the stream remains the boundary, though such middle line itself changes as a result of the change in the stream's location.¹⁰

It is worthy of note that the title to such accretion is subject to any incumbrances or rights of third parties to which the original land to which it has attached itself is subject, such as a lien, an easement or an outstanding lease.¹¹ So, if the statute of limitations has partially run against the owner's right to recover his original land, his right to recover the alluvion dies with the right to recover the former.¹²

§ 814. **Same—Apportionment of Alluvion.** Where there are several contiguous riparian proprietors, and the alluvion (or reliction) is formed along the entire shore line, the general and better rule seems to be that, in order to ascertain the respective proportions of the new land accruing to each owner, the new shore line should be divided between or among them in proportion to the length of their old water fronts, and that the points of division of the new frontage should then be connected by straight lines with the termini of the old water fronts, these straight lines constituting the lateral boundary lines of the several owners as respects the alluvion.¹³

§ 815. **Avulsion.** In the case of avulsion, when land is added by some sudden action of the water, such as a sudden change of

⁸ 2 Tiffany, Real Prop. § 453; Foster v. Wright, 4 C. P. Div. 438; Welles v. Bailey, 55 Conn. 292, 10 Atl. 565, 3 Am. St. Rep. 48.

⁹ Ante, §§ 56, 57.

¹⁰ Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186; Welles v. Bailey, 55 Conn. 292, 10 Atl. 565, 3 Am. St. Rep. 48; Gerrish v. Clough, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165; Niehaus v. Shepherd, 26 Ohio St. 40.

¹¹ Cobb v. Lavalle, 89 Ill. 331, 31 Am. Rep. 91; Town of Freedom v. Norris, 128 Ind. 377, 27 N. E. 869; People v. Lambier, 5 Denio (N. Y.) 9, 47 Am. Dec. 273; Williams v. Baker, 41 Md. 523.

¹² 2 Tiffany, Real Prop. § 453; Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Benne v. Miller, 149 Mo. 228, 50 S. W. 824.

¹³ 2 Tiffany, Real Prop. § 454; Johnston v. Jones, 1 Black 209, 17 L. Ed. 117; Inhabitants of Deerfield v. Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; Batchelder v. Keniston, 51 N. H. 496, 12 Am. Rep. 143. See Mulry v. Norton, 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206. But the application of this rule may be subject to modification in a particular case in view of peculiar circumstances. See Batchelder v. Keniston, supra; Thornton v. Grant, 10 R. I. 477, 14 Am. Rep. 701; Kehr v. Snyder, 114 Ill. 313, 2 N. E. 68, 55 Am. Rep. 866.

the course of the stream, or the violent tearing away of a body of land from its old position and lodging it in a new, the circumstances being such that the land continues to be capable of identification, there is no change of ownership at all.¹⁴

Thus, if the mid-line of a stream is the boundary line between A. and B., a sudden change in the location of the stream, and a shifting of the middle line, will not affect the boundary, which remains at the old line.¹⁵

§ 816. Islands Newly Formed. The same distinction is to be noted here as in the case of accretions between islands created by avulsion and by a more slow and gradual process.

If the island be formed by a sudden change in the course of a stream or its division into two beds, or by a sudden encroachment of the sea, etc., the soil remaining capable of identification as before, the ownership of the land does not change.¹⁶

But if the island be not so formed, but arises by a gradual process, howsoever slow and imperceptible, the island thus formed belongs to the owner of the bed of the stream, not to the riparian proprietors, unless they happen to own the bed upon which it is formed. If it be a public, or navigable, water, the water belongs to the public, and the new island follows the ownership of the bed. If the water be private, the bed is usually private also, and belongs to the riparian owner or owners.¹⁷

If the two banks of a private stream belong to different proprietors, since each as a general rule owns the bed to the middle line of the stream, an island formed in such a position that the *filum fluminis* runs through it will belong in part to one riparian owner and in part to the other; the dividing line being the pro-

¹⁴ *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 357, 34 L. Ed. 941; *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186; *Vogelsmeier v. Prendergast*, 137 Mo. 271, 39 S. W. 83; *Coulthard v. Davis*, 101 Iowa, 625, 70 N. W. 716; *Lynch v. Allen*, 20 N. C. 190, 32 Am. Dec. 672.

¹⁵ *2 Tiffany*, Real Prop. § 453; *Buttenuith v. St. Louis Bridge Co.*, 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545; *Rees v. McDaniel*, 115 Mo. 145, 21 S. W. 913; *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550.

¹⁶ *2 Tiffany*, Real Prop. § 455; *Gould, Waters*, § 166; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544; *Bonewits v. Wygant*, 75 Ind. 41.

¹⁷ *Ante*, § 56; 2 Min. Insts. 564; 3 Kent, Com. 428; *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 357, 34 L. Ed. 941; *Mulry v. Norton*, 100 N. Y. 426, 3 N. E. 581, 53 Am. Rep. 212; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; *Perkins v. Adams*, 132 Mo. 131, 33 S. W. 778; *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; *McCullough v. Wall*, 4 Rich. Law (S. C.) 68, 53 Am. Dec. 715; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 280, note; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 280, note.

longation of the *filum fluminis*.¹⁸ If the island be entirely on one side of the *filum fluminis*, it belongs altogether to the riparian owner who owns that side of the bed.

It would seem logically to follow, the middle of the stream dividing the lands of the opposite proprietors, that upon the creation of such an island the *filum fluminis* would shift, and thus the party owning the island would incidentally shove forward his boundary line. And if we suppose the operation repeated, and new islands arising from time to time on the far side of the first, it might happen that these also would belong to the owner of the first, though they actually arise on the far side of the original boundary line.¹⁹

¹⁸ 3 Kent, Com. 428; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 280, note.

¹⁹ *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 280, note.

CHAPTER XXXV.

TITLE BY ADVERSE POSSESSION UNDER STATUTE OF LIMITATIONS.

- § 817. Origin of Statutes of Limitation as Applicable to the Recovery of Land.
818. "Continual Claim" as Prolonging the Period of Limitation.
819. Common-Law Doctrine That "Descent Tolls Entry."
820. Statute of Limitations a Source of Legal Title to Adverse Occupant as Well as a Bar to the Claimant.
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841. No Disseisin of one Whose Right of Possession is Future.
842. Nature of Claimant's Entry in Order to Oust an Adverse Occupant.

§ 817. Origin of Statutes of Limitation as Applicable to the Recovery of Land. From a very early period of the law—that is, from the twelfth century—probably in consequence of some nonextant statute or assize, in ancient time, as Coke expresses it, there was a limitation imposed on real actions, even on that most favored one, the writ of right, namely, that it should not avail to recover real property where the right of the claimant accrued prior to the time of Henry I, that is, the first year of his reign (A. D. 1100); afterwards, by 20 Henry III, c. 8, the limitation was reduced to the time of Henry II (A. D. 1154); and later still, by 3 Edw. I, c. 39, and 13 Edw. I, c. 46, to 1 Richard I (A. D. 1189), when after an interval so long as practically to interpose no limitation at all, by 32 Henry VIII, c. 2 (A. D. 1541), and 21 Jac. I, c. 16 (A. D. 1624), a

period of years was fixed as a bar, not to writs of right only, but to most of the other remedies for things real; so that, by one constant law, certain limitations might serve with equal convenience, both for the time present and for all times to come.¹

And this policy has been ever since pursued, not only in the mother country, but also generally in the United States.

§ 818. "Continual Claim" as Prolonging the Period of Limitation. At common law, if one is prevented by threats or violence from entering on lands where he has a right of entry, and will make his claim as near the premises as may be, and will repeat it from year to year, he does, at common law, by such continual claim, as it is called, keep alive his right of entry and of action.²

But this method of preventing the running of the statute has been expressly abolished in some of the states of this country, and in others the statutes are so broad in their terms as to have abolished it by necessary implication.

§ 819. Common-Law Doctrine That "Descent Tolls Entry." At common law, if a disseisor or other wrongdoer dies possessed of the land of which he became seised by his own unlawful act, and the same descends to his heir, the heir hath thereby obtained an apparent right, though the actual right of possession remains in the person disseised; but the latter cannot divest this apparent right by a mere entry, or other act of his own, but only by an action at law, for, until the contrary be proved by legal demonstration, the law will rather presume the right to reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. The descent, in such a case, is said to toll, or take away, the seisin, agreeably to the maxim "*Descensus tollit seisinam.*"³

This doctrine arose from considerations connected with feudal policy, which was always solicitous to provide some one at hand to perform the feudal services, and to offer to the military vassal, as one of the strongest incentives to courage in battle, the assurance that, if he fell, his children or heirs would be, as to their inheritance, better off even than himself, being exempt from all danger of any eviction by sudden entry, or any otherwise than by the slow process of a real action.⁴

This doctrine has been expressly done away with by some of our state statutes; but, upon principle, the reason for the rule no longer

¹ 2 Min. Insts. 568, 569; Bac. Abr. Limitations (B).

² 2 Min. Insts. 576; 2 Bl. Com. 316; 3 Bl. Com. 175.

³ Ante, § 135; 2 Min. Insts. 519; 2 Bl. Com. 196.

⁴ 2 Min. Insts. 519; 2 Bl. Com. 196, 197; 3 Bl. Com. 176.

existing in this country, it would seem that it ought to have no application here.

§ 820. Statute of Limitations a Source of Legal Title to Adverse Occupant as Well as a Bar to Claimant. The statute of limitations, above described, is not only a defense which the occupant may interpose in bar of the plaintiff's action for the land, but it also constitutes a source of title to the occupant, to which he may appeal to sustain an action of ejectment brought by him as plaintiff, whether against the rightful claimant or a third person, provided the occupant's possession has been such as will cause the statute of limitations to have run in his favor.⁵

Thus, where one has been in honest, uninterrupted and adverse possession of the subject in question for the period prescribed by the statute as a bar, and is then deprived of the possession, he may found his title, upon his previous possession, and maintain an action for the subject accordingly. Lapse of time in such cases not only bars the remedy, but extinguishes the adversary's right.⁶

§ 821. Disabilities of Claimant as Prolonging the Statutory Period. Under the English statute, 21 Jac. I, c. 16, the infancy, coverture, imprisonment, or insanity of the disseisee existing at the time of the disseisin, or the fact that he was beyond the seas at that time, arrested the running of the statute.

In this country, to ascertain what circumstances will arrest the running of the statute, the local statute must be consulted.⁷

A disability will not have the effect of prolonging the statutory period, unless it existed at the time the right of action accrued; for, if the statute once begins to run, no supervening disability will stop it.⁸

In the case of coparceners and tenants in common, since they may sue severally to recover their shares, if there be an ouster of

⁵ 2 Min. Insts. 574. See cases cited *infra*.

⁶ 2 Min. Insts. 574; *Stocker v. Berney*, 1 Ld. Raym. 741; *Barwick v. Thompson*, 7 T. R. 492; *Newby v. Blakey*, 3 H. & M. 37, 66; *Brent v. Chapman*, 5 Cr. 358, 361; *Shelby v. Guy*, 11 Wheat. 361, 6 L. Ed. 495; *Turpin v. Saunders*, 32 Grat. (Va.) 27; *Denn v. Barnard*, Cowp. 597; *Taylor v. Horde*, 1 Burr. 60, 119, 126; *Leffingwell v. Warren*, 2 Black. 605, 17 L. Ed. 261; *Croxall v. Shererd*, 5 Wall. 269, 289, 18 L. Ed. 572; *Dickerson v. Colgrove*, 100 U. S. 583, 25 L. Ed. 618; *Bicknell v. Comstock*, 113 U. S. 152, 5 Sup. Ct. 399, 28 L. Ed. 962; *Campbell v. Holt*, 115 U. S. 623, 6 Sup. Ct. 209, 29 L. Ed. 483.

⁷ For a compilation of the statutes, see 3 Washburn, Real Prop. (6th Ed.) p. 148.

⁸ *Davis v. Coblens*, 174 U. S. 719, 19 Sup. Ct. 832, 43 L. Ed. 1147; *Castro v. Geil*, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84.

all, the disability of one of the co-tenants does not preserve the title of another, but merely his own title.⁹

§ 822. **Same—Tacking of Disabilities.** If a person labor under several disabilities when the cause of action accrued, he may avail himself of that which continues longest; but, when the period of limitation prescribed by the statute once begins to run, it will continue to do so, notwithstanding any supervening disability in the party himself or in another. Neither can a disability which arises after the title accrued be taken advantage of, though the later one occurs before the first is at an end; or, as it is commonly expressed, one disability cannot be tacked to another.¹⁰

And where the claimant dies still under disability, and is succeeded by another also under disability, the time for bringing the suit or making the entry is not thereby prolonged. The two disabilities cannot be tacked.¹¹

§ 823. **Nullum Tempus Occurrit Regi.** At common law, no lapse of time barred the king's title, the maxim of the law being "Nullum tempus occurrit regi." And so it is in this country, in respect to the claims of the state (and the federal government, also), except where it is otherwise provided by statute.¹²

But the ordinary statutory limitation will begin to run in favor of an adverse occupant as soon as the ownership of the land passes from the state to the state's grantee.¹³

⁹ 2 Min. Insts. 575; *Marsteller v. McLean*, 7 Cr. 156; *Doe v. Barksdale*, 2 Brock. 444, 445, Fed. Cas. No. 8,317.

¹⁰ 2 Min. Insts. 576; 2 Tiffany, Real Prop. § 439; *Doe v. Barksdale*, 2 Brock. 436, Fed. Cas. No. 8,317; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *North v. James*, 61 Miss. 761; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 476; *Duckett v. Crider*, 11 B. Mon. (Ky.) 188; *McFarland v. Stone*, 17 Vt. 165, 44 Am. Dec. 325. But see *Miller v. Bumgardner*, 109 N. C. 412, 13 S. E. 935.

¹¹ 2 Min. Insts. 577; et seq.; *Pim v. City of St. Louis*, 122 Mo. 654, 27 S. W. 525; *Henry v. Carson*, 59 Pa. 297; *Dowell v. Tucker*, 46 Ark. 438.

¹² 2 Min. Insts. 575; Bac. Abr. Limitation; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. Ed. 534; *Kemp v. Com.*, 1 Hen. & M. (Va.) 85; *Gore v. Lawson*, 8 Leigh (Va.) 462; *Nimmo v. Com.*, 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488; *Green v. Pennington*, 105 Va. 805, 54 S. E. 877.

¹³ 2 Tiffany, Real Prop. § 440; *Smith v. McCorkle*, 105 Mo. 135, 16 S. W. 602; *Stringfellow v. Tennessee Coal, Iron & R. Co.*, 117 Ala. 250, 22 South. 997; *Patten v. Scott*, 118 Pa. 115, 12 Atl. 292, 4 Am. St. Rep. 576; *Nichols v. Council*, 51 Ark. 26, 9 S. W. 305, 14 Am. St. Rep. 20; *Mathews v. Ferrea*, 45 Cal. 51; *Udell v. Peak*, 70 Tex. 547, 7 S. W. 786. But the decisions are not in accord as to the time when such private ownership commences; some holding that it does not begin until the issue of the patent, others that it begins as soon as the land is paid for and the individual becomes entitled to the patent. 2 Tiffany, Real Prop. § 440.

According to the better view, since a municipal or quasi municipal corporation is but the agent of the state, the same maxim applies to these, and adverse possession will not give title as against them—at least, so far as relates to land held by them in their governmental and public capacity.¹⁴ It is otherwise as to land owned or claimed by them in their private capacity, such as gas works, water works, etc.¹⁵

§ 824. **Nature of Occupant's Possession in General.** In order that adverse possession under the statute of limitations may operate as a bar to the claimant's right of entry or of action, and to vest a title to the land in the occupant, it is necessary (1) that the possession of the occupant, or of those claiming under or after him, should have lasted during the period prescribed by the statute; (2) that such possession should meanwhile have been continuous and uninterrupted by any return of the land to the ownership of the claimant; (3) that the occupant's possession should have been free from fraud; (4) that it should have been visible and notorious; (5) that it should have been exclusive; (6) that it should have been hostile; and (7) that it should be actual, in general, though sometimes a constructive possession by the occupant under color of title (that is, under a paper title) will suffice.¹⁶

The possession, to give the occupant title, must embrace all of these elements; the want of any one of them being fatal to his title. Thus, in *Ward v. Cochran*,¹⁷ the jury in an ejectment suit having brought in a special verdict to the effect that the defendant's possession of the land had been "open, continued, notorious and adverse" for the time required by the statute, the court held that, inasmuch as the jury had failed to find the possession to have

¹⁴ 2 Tiffany, Real Prop. § 440; 2 Dillon, Munic. Corp. § 667 et seq.; *Almy v. Church*, 18 R. I. 182, 26 Atl. 58; *Cheek v. City of Aurora*, 92 Ind. 107; *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834; *Board of Education of City and County of San Francisco v. Martin*, 92 Cal. 209, 28 Pac. 799; *Kittaning Academy v. Brown*, 41 Pa. 269. But see *City of Covington v. McNickle*, 18 B. Mon. (Ky.) 262; *Oxford Township v. Columbia*, 38 Ohio St. 87; *City of Fort Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19.

¹⁵ 2 Dillon, Munic. Corp. § 675; *Ames v. City of San Diego*, 101 Cal. 390, 35 Pac. 1005; *City of Chicago v. Middlebrooke*, 143 Ill. 265, 32 N. E. 457; *City of Bedford v. Willard*, 133 Ind. 562, 33 N. E. 368, 36 Am. St. Rep. 563.

¹⁶ 2 Min. Insts. 578, 579; 3 Th. Co. Lit. 4; *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195; *Sulphur Mines Co. of Virginia v. Thompson*, 93 Va. 294, 25 S. E. 232; *Virginia Midland R. Co. v. Barbour*, 97 Va. 118, 33 S. E. 554; *Trotter v. Cassaday*, 3 A. K. Marsh. (Ky.) 365, 13 Am. Dec. 185, note; *Love v. Shields*, 3 Yerg. (Tenn.) 405.

¹⁷ 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195.

been exclusive and actual, it was an imperfect verdict, and a *venire facias de novo* should be awarded.

§ 825. **Duration of Occupant's Possession.** The duration of the adverse possession is prescribed by the statute of the state in which the land lies; and it varies from five to thirty years. It may also vary in the same state according to circumstances.¹⁸

§ 826. **Continuity of Occupant's Possession.** The possession of the occupant, or of those claiming under or after him, must continue uninterruptedly during the statutory period. If there be an interruption, during which the possession of the original claimant, or those holding under him, is restored, or recognized as existing, after which interruption possession is resumed by the occupant, the running of the limitation period not only ceases during the period of the interruption, but ceases altogether, and the count must be begun anew upon the occupant's resumption of possession.¹⁹

Such a break in the continuity of the possession may occur upon the occupant's abandonment of the premises;²⁰ but the mere fact that the acts of possession are not continuous, day in and day out, or that there are cessations of actual occupancy, does not necessarily show an interruption of the possession, the consequences depending on the nature of the land and of the acts in question, and upon the circumstances of the particular case.²¹

A break in the continuity of the possession may also arise from the actual ouster, or open and notorious acts amounting to an ouster, of the occupant by the rightful owner, and his resumption of the possession of the occupied land, within the statutory period;²² or by the occupant's recognition of the true owner's right to the

¹⁸ 3 Washburn, Real Prop. (6th Ed.) p. 148 et seq.

¹⁹ 2 Min. Insts. 577; Kinney v. Beverley, 2 Hen. & M. (Va.) 318, 341; Taylor v. Burnsidess, 1 Grat. (Va.) 165, 189, 202; Middleton v. Johns, 4 Grat. (Va.) 129; Old South Soc. v. Wainwright, 156 Mass. 115, 30 N. E. 476; Bliss v. Johnson, 94 N. Y. 235; Armstrong v. Risteanu, 5 Md. 256, 59 Am. Dec. 115; Ross v. Goodwin, 88 Ala. 390, 6 South. 682.

²⁰ 2 Min. Insts. 581; Taylor v. Burnsidess, 1 Grat. (Va.) 165, 201, 210; Hollingsworth v. Sherman, 81 Va. 674; Downing v. Mayes, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896; Stephens v. Leach, 19 Pa. 262; Nixon v. Porter, 38 Miss. 401; Sharp v. Johnson, 22 Ark. 79.

²¹ 2 Tiffany, Real Prop. § 437; Downing v. Mayes, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896; Hughs v. Pickering, 14 Pa. 297; Ford v. Wilson, 35 Miss. 490, 72 Am. Dec. 137.

²² 2 Min. Insts. 581; Taylor v. Burnsidess, 1 Grat. (Va.) 165, 208, 210; Bowen v. Guild, 130 Mass. 121; Altemus v. Campbell, 9 Watts (Pa.) 28, 34 Am. Dec. 494; Burrows v. Gallup, 32 Conn. 493, 87 Am. Dec. 186; Campbell v. Wallace, 12 N. H. 362, 37 Am. Dec. 219.

possession;²³ or by the owner's recovery of the land in the action of ejectment.²⁴

§ 827. Same—Tacking of the Possession of One Occupant to That of Another. If an occupant, before he has been in possession of the land as against the true owner for the full statutory period, dies or transfers his interest in the land to another, or is disseised by a third person, a question is at once presented whether the successor to the first occupant is entitled to have the possession of the first occupant counted in with his own, or "tacked," in order to hasten the vesting of the title by adverse possession under the statute of limitations.

Various considerations are to be looked to in answering these questions, and it is advisable to take up the cases above presented in succession; the general principle being that the two possessions, to be tacked, must be in privity or connected.²⁵

§ 828. Same—1. Death of First Occupant. It appears to be conceded that if, upon the occupant's death, his heir or devisee immediately enters and takes possession of the land, his possession may be tacked to that of his ancestor or testator, so that the two periods may be reckoned as one in estimating the duration of the adverse possession.²⁶

So the widow of the occupant, being entitled to quarantine,²⁷ and an immediate entry upon the land for that purpose, may "tack" such possession to the possession of her deceased husband.²⁸ But it is said to be otherwise with respect to the ordinary dower rights of the widow, because of the break of continuity between the husband's death and the time of the assignment of her dower.²⁹ It

²³ 2 Tiffany, Real Prop. § 437; Warren v. Bowdran, 156 Mass. 280, 31 N. E. 300; Ingersoll v. Lewis, 11 Pa. 212, 51 Am. Dec. 536; Williams v. Scott, 122 N. C. 545, 29 S. E. 877; Lovell v. Frost, 44 Cal. 471.

²⁴ 2 Tiffany, Real Prop. § 437; Moore v. Greene, 19 How. 69, 15 L. Ed. 533; Bishop v. Truett, 85 Ala. 376, 5 South. 154; Smith v. Hornback, 4 Litt. (Ky.) 232, 14 Am. Dec. 122; Gould v. Carr, 33 Fla. 523, 15 South. 259, 24 L. R. A. 130; McGrath v. Wallace, 85 Cal. 622, 24 Pac. 793; Mabary v. Dollarhide, 98 Mo. 198, 11 S. W. 611, 14 Am. St. Rep. 639.

²⁵ Holtzman v. Douglas, 168 U. S. 278; 18 Sup. Ct. 65, 42 L. Ed. 466; Johnston v. Case, 131 N. C. 491, 42 S. E. 957. See Hollingsworth v. Sherman, 81 Va. 674.

²⁶ 2 Tiffany, Real Prop. § 438; Haynes v. Boardman, 119 Mass. 414; Sawyer v. Kendall, 10 Cush. (Mass.) 241; McNeely v. Langan, 22 Ohio St. 32; Overfield v. Christie, 7 Serg. & R. (Pa.) 173; Fugate v. Pierce, 49 Mo. 441.

²⁷ Ante, § 300.

²⁸ Hannon v. Hounihan, 85 Va. 429, 12 S. E. 157. See Hulvey v. Hulvey, 92 Va. 182, 185, et seq., 23 S. E. 233.

²⁹ 2 Tiffany, Real Prop. § 438; Sawyer v. Kendall, 10 Cush. (Mass.) 241; Robinson v. Allison, 124 Ala. 325, 27 South. 461. But see Mill v. Bodley, 4 T. B. Mon. (Ky.) 248; Hickman v. Link, 97 Mo. 482, 10 S. W. 600.

will be remembered, however, that upon assignment the widow takes, by relation, as from her husband's death.³⁰

§ 829. **Same—2. Transfer by First Occupant.** Upon a transfer of his rights (such as they are) by the first occupant to a second, who immediately enters and continues the possession without a break, the weight of authority, though perhaps not of reason, is in favor of the latter's right to "tack" his possession to that of his grantor;³¹ yet, rather inconsistently, it is quite generally held that the transfer, not being of any actual legal interest in the land, need not conform to the statute of frauds, and may be oral.³² It would seem upon principle that, if the transfer of the first occupant's potential title by adverse possession should avail his grantee to hasten the vesting of his own title by adverse possession, it should be regarded as a sufficiently valuable interest in the land to require its transfer to conform to the statute regulating the transfer of interests in land, or, per contra, if the transfer passes no interest in the land, it should create no privity between the parties and should be given no effect in hastening the running of the statute of limitations.³³

§ 830. **Same—3. Disseisin of First Occupant.** However it may be where there is a contractual connection between the successive occupants, such as has just been considered, it seems to be quite generally conceded that, if the first adverse occupant is disseised by his successor, the latter, for want of privity, cannot tack the disseisee's possession to his own.³⁴

§ 831. **Fraudulent Possession of Occupant.** A fraudulent possession can prove nothing as to the proper right of the party who insists on such possession, or as to any presumed relinquishment of the adverse claimant. It is an acknowledged principle, at least

³⁰ Ante, § 250. See *Hulvey v. Hulvey*, 92 Va. 182, 23 S. E. 233.

³¹ *Frost v. Courtis*, 172 Mass. 401, 52 N. E. 515; *Overfield v. Christie*, 7 Serg. & R. (Pa.) 173; *McNeely v. Langan*, 22 Ohio St. 32; *Gage v. Gage*, 30 N. H. 420. But see *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3.

³² 2 *Tiffany*, Real Prop. § 438; *Hughs v. Pickering*, 14 Pa. 297; *McNeely v. Langan*, 22 Ohio St. 32; *Com. v. Gibson*, 85 Ky. 666, 4 S. W. 453; *Davock v. Nealon*, 58 N. J. Law, 21, 32 Atl. 675.

³³ See *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Ward v. Bartholomew*, 6 Pick. (Mass.) 409. See, also, *Hulvey v. Hulvey*, 92 Va. 182, 23 S. E. 233.

³⁴ 2 *Tiffany*, Real Prop. § 438; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Lucy v. Tennessee & C. R. Co.*, 92 Ala. 246, 8 South. 806; *Erck v. Church*, 87 Tenn. 580, 11 S. W. 794, 4 L. R. A. 641; *Jarrett v. Stevens*, 36 W. Va. 445, 15 S. E. 177; *San Francisco v. Fulde*, 37 Cal. 349, 99 Am. Dec. 278. But see *Davis v. McArthur*, 78 N. C. 357; *Scales v. Cockrill*, 3 Head. (Tenn.) 432.

in courts of equity, that in cases of fraud the statute of limitations commences not to run, in general, until the fraud is discovered.³⁵

§ 832. **Notoriousness of Occupant's Possession.** It is by no means the purpose of the statute of limitations to permit one man to deprive another of his land by fraud and chicanery, or by acts of ownership exercised in secret, so that the owner might not reasonably be expected to know of the adverse claim. On the contrary, it is well established that the occupant's entry upon the land must be followed by acts of ownership, sufficiently pronounced and continuous in character to charge the owner with notice of the occupant's adverse claim, such as continued residence on the land, or the cultivation and improvement thereof, or in some cases the building of fences, or in the case of wild mountain lands acts perhaps even less pronounced.³⁶

The character of the acts necessary to give to the party the seisin required must, of course, vary with the situation of the land and the condition of the country. In a settled and cultivated region, an actual occupation and pernanacy of the profits may be requisite; whilst in the wilderness a possession less definite might suffice, if it appeared that the property was not susceptible of a stricter occupation. But it must always be an actual, visible, notorious and continued possession. And hence wild and uncultivated lands, remaining completely in a state of nature, cannot be the subject of adversary possession. If such notoriety and continuousness of seisin in the adverse claimant were not demanded, any proprietor of vacant lands might be disseised and deprived of his lands without his knowledge or the possibility of protecting himself.³⁷

Such being the character of adversary possession, it has been made a question whether such possession can be had of lands covered with water. There is no doubt, however, that acts of owner-

³⁵ 2 Min. Insts. 578; 2 Story, Eq. Jur. §§ 1521, 1521a; *Hunter v. Spotswood*, 1 Wash. (Va.) 145; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 122, 11 Am. Dec. 417; *Kitty v. Fitzhugh*, 4 Rand. (Va.) 600; *Evans v. Spurgin*, 11 Grat. (Va.) 623; *Rowe v. Bentley*, 29 Grat. (Va.) 760; *Massie v. Heiskell*, 80 Va. 789, 804; *Badger v. Badger*, 2 Wall. 92, 17 L. Ed. 836.

³⁶ 2 Min. Insts. 580; *Overton v. Davisson*, 1 Grat. (Va.) 217, 42 Am. Dec. 544; *Lusk v. Pelter*, 101 Va. 790, 45 S. E. 333; *Alabama State Land Co. v. Kyle*, 99 Ala. 474, 13 South. 43; *Susquehanna & W. Val. Railroad & Coal Co. v. Quick*, 68 Pa. 189; *Congdon v. Morgan*, 14 S. C. 587; *Brumagin v. Bradshaw*, 39 Cal. 24, 50; *Ewing v. Burnet*, 11 Pet. 53, 9 L. Ed. 624; *Barclay v. Howell*, 6 Pet. 513, 8 L. Ed. 477. See cases cited *infra*.

³⁷ 2 Min. Insts. 580, 581; *Overton v. Davisson*, 1 Grat. (Va.) 217, 225, 42 Am. Dec. 544; *Lusk v. Pelter*, 101 Va. 790, 45 S. E. 333. See *Royall v. Lisle*, 15 Ga. 545, 60 Am. Dec. 712; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 604, 18 Am. Dec. 463; *Ewing v. Burnet*, 11 Pet. 41, 9 L. Ed. 624.

ship may be habitually and notoriously exercised in respect to lands so situated, as by staking them off, insisting upon the exclusive right to use and enjoy them, and in other like ways, and so an adversary possession may be established.³⁸

On the other hand, the mere sporadic and occasional entry upon the land for the purpose of surveying the same, or of cutting and sawing timber, the possession being transient, is not enough to operate a disseisin of the rightful owner; nor, if it were, is it such continuous, exclusive, and notorious possession as can by itself support a claim of title in opposition to the superior title of the true owner.³⁹

Finally, it is to be observed that, if the occupant's possession was begun in privity with the rightful claimant, a higher degree of notoriety must attach to the possession than would be demanded if there were no such relation between the parties; for the privity is itself an explanation of the possession, and the rightful owner is not bound to seek another, unless notice of the fact of the disloyal severance of the privity be brought home to him. Hence, in such case, there must be a clear, positive, and continuous disclaimer and disavowal of the title of the rightful owner, and the assertion of an adverse right brought home to the adverse claimant. The possession must have become tortious and unlawful by the disloyal acts of the party in possession, so open, notorious and continued as to show fully and clearly the changed character of his possession and notice thereof to the rightful claimant. This principle is applicable, for example, as between vendor and vendee under an imperfect contract of sale, as between landlord and tenant, grantor and grantee (the grantor remaining in possession), and other cases of the same sort.⁴⁰

§ 833. Exclusiveness of Occupant's Possession. It is one of the essentials of adverse possession that it be exclusive—that is, that it exclude and deny all idea of ownership either in the true owner or in a third person;⁴¹ of the true owner, because, if he is also in

³⁸ 2 Min. Insts. 581; *Power v. Tazewells*, 25 Grat. (Va.) 786; *Norfolk City v. Cooke*, 27 Grat. (Va.) 436, 437. See *Austin v. Minor*, 107 Va. 101, 57 S. E. 609.

³⁹ 2 Min. Insts. 580; *Dawson v. Watkins*, 2 Rob. (Va.) 259, 269; *Pasley v. English*, 5 Grat. (Va.) 141, 152, 157; *Denham v. Holeman*, 26 Ga. 182, 71 Am. Dec. 198; *Parker v. Wallis*, 60 Md. 15, 45 Am. Rep. 703; *Wheeler v. Winn*, 53 Pa. 122, 91 Am. Dec. 186; *Williams v. Wallace*, 78 N. C. 354.

⁴⁰ *Day v. Cochran*, 24 Miss. 261; *Clarke v. McClure*, 10 Grat. (Va.) 305; 3 Washburn, Real Prop. (6th Ed.) § 1975; Aug. Lim. 401.

⁴¹ *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195; *Virginia Midland R. Co. v. Barbour*, 97 Va. 118, 33 S. E. 554; *Collins v. Lynch*,

possession, or has a right to the possession, the possession of another would in law be regarded either as a trespass merely, or as in the exercise of a license, neither of which theories would give rise to an adverse possession;⁴² and of third persons, because if he permits others also to exercise acts of ownership upon the land (except as his tenants or licensees) he is asserting a title not in himself, but in the public.⁴³

On the other hand, it is to be observed that a grantee under an invalid transfer, who is in actual and exclusive possession of an entire tract for the requisite period, takes a title to the entire tract by adverse possession, exclusive of the rights of others who were tenants in common with his grantor, provided the grantor has conveyed to him the whole tract, and not merely his individual interest therein.⁴⁴

§ 834. Hostile Character of Occupant's Possession. As no one can be barred by the statute of limitations unless he is out of possession, and as the possession of one claiming under another is considered as in fact the possession of the latter, it follows that, in order to plead the statute of limitations successfully, the possession must be adverse to that of the true owner under some claim of right such as will exclude any recognition of the latter's rights. It is not necessary, however, that there should be color of title (that is, written evidence of title, such as a deed, a patent from the state, etc.).⁴⁵

It is immaterial whether the claim of right be true or false, good or bad, in the first instance; but if there be a mere claim, without color of title, the adverse holding of the occupant is always con-

167 Pa. 635, 31 Atl. 921; *Cahill v. Palmer*, 45 N. Y. 478; *Goodson v. Brothers*, 111 Ala. 589, 20 South. 443.

⁴² 2 Tiffany, Real Prop. § 442; *Bellis v. Bellis*, 122 Mass. 414; *O'Hara v. Richardson*, 46 Pa. 385; *Brown v. Chicago, B. & K. C. Ry. Co.*, 101 Mo. 484, 14 S. W. 719.

⁴³ 2 Tiffany, Real Prop. § 442; *Kneller v. Lang*, 137 N. Y. 589, 33 N. E. 555; *Burrows v. Gallup*, 32 Conn. 493, 87 Am. Dec. 186; *Gittings v. Moale*, 21 Md. 135.

⁴⁴ *Preston v. Virginia Mining Co.*, 107 Va. 248, 57 S. E. 651; *Ricker v. Butler*, 45 Minn. 545, 48 N. W. 407.

⁴⁵ 2 Min. Insts. 578; *Coalter v. Hunter*, 4 Rand. (Va.) 58, 15 Am. Dec. 726; *City of Boston v. Richardson*, 105 Mass. 372. The phrase "claim of title" is to be distinguished from "color of title" in this connection; the latter applying only to that particular sort of claim which is based upon some written muniment of title, it being immaterial whether it be valid or void. See *Sulphur Mines Co. of Virginia v. Thompson*, 93 Va. 294, 25 S. E. 232; *Nelson v. Davidson*, 160 Ill. 254, 43 N. E. 361, 31 L. R. A. 325, 52 Am. St. Rep. 338; *McMullin v. Erwin*, 58 Ga. 427.

fined to that portion of the land actually occupied.⁴⁶ On the other hand, if the adverse possession be under color of title, the possession may, under certain circumstances, extend beyond the limits of the land actually occupied, and may embrace all the land covered by the deed or other muniment of title under which the occupant claims.⁴⁷

§ 835. **Same—Occupation through Mistake as to Boundaries.** If one, either of set purpose or with entire indifference to the rights of his neighbor, builds upon or otherwise occupies openly and notoriously his neighbor's land, there is no doubt but that this constitutes an adverse possession which will ripen after the lapse of the statutory period into a perfect legal title.⁴⁸

But if he is acting through a bona fide mistake as to his boundaries, honestly believing that he is upon his own land, and without any intention of ousting his neighbor, the question is more difficult of solution, as where he builds a few inches over his neighbor's line by mistake, believing he is on his own lot.

The solution depends upon the intention with which the possession is taken and held. If the intention be to take and hold the land at all events, whether it belong to the occupant or not—that is, to oust any adverse claimant, if necessary—the case comes under the first instance above described, and the possession would clearly be adverse.⁴⁹ But if the occupant have no such intention in his mind, but only the intention to use and enjoy his own property in a proper and lawful way, the courts are divided as to whether this constitutes the possession adverse.⁵⁰

⁴⁶ *Virginia Midland R. Co. v. Barbour*, 97 Va. 122, 33 S. E. 554; *Poignard v. Smith*, 8 Pick. (Mass.) 272; 3 Washburn, Real Prop. (6th Ed.) § 1967.

⁴⁷ Post, § 840 et seq.

⁴⁸ 2 *Tiffany*, Real Prop. § 443; *Brock v. Bear*, 100 Va. 565, 42 S. E. 307; *McMurray v. Dixon*, 105 Va. 605, 611, 54 S. E. 481; *Finch v. Ullman*, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383, note; *Taylor v. Fomby*, 116 Ala. 621, 22 South. 910, 67 Am. St. Rep. 149; *Watrous v. Morrison*, 33 Fla. 261, 14 South. 805, 39 Am. St. Rep. 139; *Wilson v. Hunter*, 59 Ark. 626, 28 S. W. 419, 43 Am. St. Rep. 63; *Grube v. Wells*, 34 Iowa, 148; *Preble v. Maine Central R. Co.*, 85 Me. 260, 27 Atl. 149, 21 L. R. A. 829, 35 Am. St. Rep. 366.

⁴⁹ See authorities cited supra.

⁵⁰ Authorities holding that the innocence of the possession is immaterial, provided it be actual and visible, are *Tolman v. Sparhawk*, 5 Metc. (Mass.) 469; *Crary v. Goodman*, 22 N. Y. 170; *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680; *Burnell v. Maloney*, 39 Vt. 579, 94 Am. Dec. 358; *Metcalf v. McCutchen*, 60 Miss. 145; *Yetzer v. Thoman*, 17 Ohio St. 130, 91 Am. Dec. 122; *Greene v. Anglemire*, 77 Mich. 168, 43 N. W. 772; *Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. 522; *Ramsey v. Glenny*, 45 Minn. 401, 48 N. W. 322, 22 Am. St. Rep. 736; *Levy v. Yerga*, 25 Neb. 764, 41 N. W. 773, 13 Am. St. Rep. 525. The following cases require the possession, in order that it be considered ad-

It may be observed, also, in this connection, that if two adjacent landowners, whose boundary line is in dispute, agree orally upon a line, by way of compromise, and they take and hold possession up to that line for the statutory period, the mere possession will in time ripen into a title by adverse possession; but since neither party can disclaim to hold the freehold acquired under his deed, or transfer the same to another, save by deed, will, or in a court of record, the parties can in a court of law acquire no title by virtue of the parol agreement itself, nor in any way alter the rights already vested in them under their respective deeds.⁵¹ It would seem, however, upon principle, that in equity such an agreement, though by parol, being partly performed by the surrender of the possession, should be regarded as transferring mutually the equitable title up to the boundary line agreed upon, at least as between the parties.

But if the dispute as to the boundary line has originated by reason of the ambiguous language of the deeds conveying the land, one interpretation locating the boundary line at one place, another interpretation locating it elsewhere, and the agreement of the parties determines at which of these places it is to be located, merely interpreting the ambiguous language of the deeds, the agreement in such case is very generally held not to involve a transfer of the title to land, and hence the boundary line becomes fixed by such agreement, though it be merely oral.⁵²

verse, to be with the intent of claiming to the assumed boundary, even though that boundary be incorrect: *Ayers v. Reidel*, 84 Wis. 276, 54 N. W. 588; *Mills v. Penny*, 74 Iowa, 172, 37 N. W. 135, 7 Am. St. Rep. 474; *Winn v. Abeles*, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138; *McCabe v. Bruere*, 153 Mo. 1, 54 S. W. 450; *Chance v. Branch*, 58 Tex. 490; *Caufield v. Clark*, 17 Or. 473, 21 Pac. 443, 11 Am. St. Rep. 845; and the cases cited in previous note.

⁵¹ *McMurray v. Dixon*, 105 Va. 611, 54 S. E. 481; *Fry v. Stowers*, 98 Va. 417, 36 S. E. 482; *Suttle v. Richmond, F. & P. R. Co.*, 76 Va. 284, 286; *Watrous v. Morrison*, 33 Fla. 261, 14 South. 805, 39 Am. St. Rep. 139; *Vosburgh v. Teator*, 32 N. Y. 561; *Nichol v. Lytle*, 4 Yerg. (Tenn.) 456, 26 Am. Dec. 240; *Olin v. Henderson*, 120 Mich. 149, 79 N. W. 178; *Gayheart v. Cornett*, 42 S. W. 730, 19 Ky. Law Rep. 1052; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175; *Lennox v. Hendricks*, 11 Or. 33, 4 Pac. 515.

⁵² *Watrous v. Morrison*, 33 Fla. 261, 14 South. 805, 39 Am. St. Rep. 139; *Brummell v. Harris*, 148 Mo. 430, 50 S. W. 93; *St. Bede College v. Weber*, 168 Ill. 324, 48 N. E. 165; *O'Donnell v. Penney*, 17 R. I. 164, 20 Atl. 305; *Lindsay v. Springer*, 4 Har. (Del.) 547; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880; *Clark v. Hulsey*, 54 Ga. 608; *Harrell v. Houston*, 66 Tex. 278, 17 S. W. 731; *Pittsburg & L. A. Iron Co. v. Lake Superior Iron Co.*, 118 Mich. 109, 76 N. W. 395; *Helm v. Wilson*, 76 Cal. 476, 18 Pac. 604; *Archer v. Helm*, 69 Miss. 730, 11 South. 3; *Glen Mfg. Co. v. Weston Lumber Co. (C. C.)* 80 Fed. 242.

§ 836. **Adverse Possession Negatived in Certain Cases—Enumeration.** The adverse character of a possession, though it be long continued, may be negatived by the existence of certain circumstances, which, either as matter of law or matter of fact, take the case outside the realm of adverse possession.

These cases may be enumerated as follows: (1) Where the parties claim under the same title; (2) where the possession of one party is consistent with the title of the other; (3) where the occupant has acknowledged the claimant's title.

§ 837. **Same—1. Where the Parties Claim under the Same Title.** The instances falling under this head are derived chiefly from England, our own cases affording few or none. Thus, if a father die seised in fee, leaving two sons, and his younger son enters to the prejudice of the elder, and before him, although it amounts properly to an ouster of the elder by abatement, yet the statute does not operate against the elder son, because the law presumes that the younger entered, claiming the land as heir to his father, in order to preserve the inheritance in the family, and not as designing a wrong to his brother, and so his possession is the possession of the elder, who claims by the same title.⁵³

So, also, if a sister enters upon the land descended from her father, before her brother, the legal heir, can do so, and remain in possession more than the time prescribed by the statute of limitations, yet will it not avail her for a like reason, because the law will intend that she entered as heir to the father, to preserve the inheritance, and not adversely to the brother, who claiming by the same title, her possession enures as his.⁵⁴

It must be observed that in both of these cases, if the lawful heir enters, and then is ousted by the younger brother or sister, it would be impossible to assign so charitable an interpretation to his act, and the possession of the wrongdoer is adverse.⁵⁵

§ 838. **Same—2. Where the Possession of Occupant Is Consistent with Claimant's Title.** This is the case where the possession of one is the possession of the other, as in the instance of agent relatively to the principal, or of a tenant in respect to his landlord; or where the estate of the party in possession and that of the claimant form different parts of one and the same estate, as in the instance of a particular tenant and the remainderman; or where the relation of trustee and cestui que trust, or of mortgagor and mortgagee, or of vendor and vendee, or of co-tenancy, subsists between the parties.

⁵³ 2 Min. Insts. 583; 3 Th. Co. Lit. 47, 48, note (Y), 50 et seq.

⁵⁴ 2 Min. Insts. 583.

⁵⁵ 2 Min. Insts. 583; 3 Th. Co. Lit. 50.

But in all such cases this consistency of the possessions of each lasts only so long as the possessions are not distinctly antagonistic, and immediately upon a clear, positive, and open disclaimer or disavowal by the occupant that he is holding in privity with the true owner the possession becomes adverse.⁵⁶

And it will be remembered that in case of co-tenants, whether joint tenants, tenants in common, or co-parceners, notwithstanding the general rule that the possession of one is the possession of all, yet the possession of one such tenant may become adverse to the others, upon an actual ouster of them or any other act amounting to a total denial of the rights of the others as co-tenants.⁵⁷

So the possession of a lessee is that of the lessor, as long as the lease subsists, and that although no rent be paid; but when the rent is not a merely nominal one, the omission to pay it, or to make any other acknowledgment of a tenancy for a great number of years, might be evidence of an adverse possession.⁵⁸

§ 839. Same—3. Where Occupant Has Acknowledged Claimant's Title. Where the occupant has acknowledged title to be in the claimant during the statutory period, the possession of the occupant is not deemed adverse; the acknowledgment negating such a conclusion.⁵⁹

§ 840. Actual and Constructive Possession of Occupant under Color of Title. While, in order that an occupant's possession may ripen into a legal title under the statute of limitations, it is a general rule that his possession must be actual, and that a mere constructive possession (arising from the possession of a deed or other paper title describing the boundaries of the land claimed thereunder), though for the statutory period, will not suffice,⁶⁰ yet an actual possession of part of the land in dispute may sometimes aid a con-

⁵⁶ 2 Min. Insts. 583; 3 Washburn, Real Prop. (6th Ed.) § 1976; Clarke v. McClure, 10 Grat. (Va.) 305; Day v. Cochran, 24 Miss. 261. See ante, §§ 832, 727, 758, 771.

⁵⁷ Ante, §§ 727, 758, 771; 2 Min. Insts. 473, 499, 505.

⁵⁸ 2 Min. Insts. 584.

⁵⁹ 2 Min. Insts. 585; Roe v. Farrars, 2 Bos. & P. 546; Hatcher v. Fineaux, 1 Ld. Raym. 740; Jackson v. Sears, 10 Johns. (N. Y.) 435, 441; Hunt v. Hunt, 3 Metc. (Mass.) 175, 37 Am. Dec. 130; Burghardt v. Turner, 12 Pick. (Mass.) 534; Piatt v. Vattier, 9 Pet. 416, 9 L. Ed. 173.

⁶⁰ 2 Min. Insts. 579, 580; 2 Tiffany, Real Prop. § 441; Ward v. Cochran, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195; White v. Burnley, 20 How. 235, 15 L. Ed. 886; Lipscomb v. McClellan, 72 Ala. 151; Walker v. Hughes, 90 Ga. 52, 15 S. E. 912; Christy v. Spring Valley Water Works, 97 Cal. 21, 31 Pac. 1110. Possession may sometimes be constructive only. Thus, when the commonwealth grants lands to a first patentee, it puts him constructively into possession, notwithstanding at the time of the emanation of the patent there was an actual occupation of the premises by another person; for such

structive possession of the rest, so as to permit the adverse occupant to acquire title to the whole after the lapse of the statutory period.

In other words, as a common-law principle, the actual possession of a part of a tract of land in dispute, claimed under a paper title (that is, under color of title), may sometimes be construed as a possession of the whole tract, so as to give the occupant a title thereto after the statutory period, upon the principle that one who has notice of an actual adverse occupancy of part of his land under a claim based upon a written document defining the boundaries claimed is also chargeable with notice that the claim is limited only by the terms of the document itself, supposing the boundaries to be described therein with sufficient accuracy to identify them; the validity of the document being immaterial.⁶¹

Such notice, however, cannot be reasonably charged to the first grantee unless the adverse claimant actually occupies part of the land owned by the former; for he cannot be supposed to be put upon inquiry by reason of the fact that the adverse claimant is in actual possession of his own land or of that of a third person, but only where he is in occupancy of the land of the first grantee. Hence the junior grantee must be in actual possession of part of the land in dispute (the "interlock," as it is called), in order that the

person's possession (as the commonwealth is incapable of being disseised) cannot be adversary. And such elder patentee's seisin continues until some one actually enters by a *pedis positio* under an adverse claim of title, when, the grantee being dispossessed, the statute of limitations begins to run against him, and in a competent time, if the actual adversary possession continues, will bar his claim; but a junior grant from the commonwealth does not of itself have the effect of determining the first patentee's constructive seisin. Hence, where a patentee of the commonwealth, having no actual, but only the constructive, seisin arising from the commonwealth's grant, brings an action against an occupant of the land who claims title by possession, it is competent to the defendant to prove a prior commonwealth's grant (although he has no privity with the grantee therein), because that defeats the plaintiff's constructive seisin, by an adverse constructive seisin in the first patentee, and so destroys all title to recover of the occupant, the plaintiff having neither actual nor constructive possession. 2 Min. Insts. 579, 580. This is simply an application of the well-settled rule that a plaintiff in ejectment must recover on the strength of his own title, and cannot rely on the weakness of the defendant's. Hence a defendant in ejectment may always defend by showing an outstanding paramount title in a third person, unless his entry was in privity with the plaintiff, or they both claim from the same source.

⁶¹ *Koiner v. Rankin*, 11 Grat. (Va.) 427; *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27, 40 S. E. 103; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877; *Wright v. Mattison*, 18 How. 50, 15 L. Ed. 280; *Carter v. Chevalier*, 108 Ala. 563, 19 South. 798; *Reddick v. Long*, 124 Ala. 260, 27 South. 402; *Ellington v. Ellington*, 103 N. C. 54, 9 S. E. 208; *Davis v. Stroud*, 104 N. C. 484, 10 S. E. 666; *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525.

principle "possession of part is the possession of the whole" shall apply.⁶²

Moreover, the constructive possession is dependent for its effect upon the actual possession of part of the land in dispute, and continues or fails with it. Consequently, if the occupant conveys that part of the tract which constituted his actual possession, but not the whole tract, he loses his constructive possession of the residue, unless he takes actual possession of some part thereof, or, rather, he loses the benefit that might attach to a constructive possession aided by an actual possession of part.⁶³

At common law, the application of these principles seems to be confined to those cases where the rightful owner (the senior grantee) has no actual possession of any part of his tract; for the principles apply equally to both grantees, and the actual possession of part of his tract by the rightful owner constitutes on his part also a constructive possession of the whole. And as between the two constructive possessions of that part of the land in dispute (the interlock) not actually occupied by either, the senior grantee, having the eldest, as well as the rightful, seisin, should prevail, thus confining the junior grantee to that part of the interlock actually occupied by him.⁶⁴

But if the senior grantee be not in actual possession of any part of his tract, the common-law principle above mentioned applies, and the junior grantee's actual possession of part of the interlock will aid his constructive possession of the remainder, so as to make it superior to the purely constructive possession of the senior grantee, thus giving the junior grantee adverse possession of the whole interlock, which, if held long enough, will ripen into a perfect title.⁶⁵

§ 841. No Disseisin of One whose Right of Possession is Future. It is universally true at the present day that the statute of limitations does not begin to run against any person until a right of action has accrued to him. Hence no disseisin of a life tenant can af-

⁶² *Taylor v. Burnside*, 1 Grat. (Va.) 165, 191, 192; *Koaner v. Rankin*, 11 Grat. (Va.) 420; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877; *Garrett v. Ramsey*, 26 W. Va. 345; *Hole v. Rittenhouse*, 25 Pa. 491; *Turner v. Stephenson*, 72 Mich. 409, 40 N. W. 735, 2 L. R. A. 277; *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190. See 2 Tiffany, Real Prop. § 444.

⁶³ *Sharp v. Shenandoah Furnace Co.*, 100 Va. 33, 40 S. E. 103; *Trotter v. Cassady*, 3 A. K. Marsh. (Ky.) 365, 13 Am. Dec. 183; *West v. McKinney*, 92 Ky. 638, 18 S. W. 633; *Cunningham v. Robertson*, 1 Swan (Tenn.) 138; *Chandler v. Rushing*, 38 Tex. 591.

⁶⁴ *Green v. Lister*, 8 Cr. 229; *Hunt v. Wickliffe*, 2 Pet. 201, 7 L. Ed. 397; *Hunnicutt v. Peyton*, 102 U. S. 333, 369, 26 L. Ed. 113.

⁶⁵ *Overton v. Davison*, 1 Grat. 223, 224, 42 Am. Dec. 544; *Green v. Pennington*, 105 Va. 804, 54 S. E. 877; 3 Washburn, Real Prop. (6th Ed.) § 1982 et seq.

fect the reversioner or remainderman, until the termination of the life estate.⁶⁶

So, also, in the case of a future contingent limitation, whether by way of remainder or executory limitation, since the party's title under it does not accrue until the happening of the contingency entitles him to the possession, the statute does not begin to run against him until that time.⁶⁷

§ 842. **Nature of Claimant's Entry in Order to Oust an Adverse Occupant.** The entry must, of course, appear to have been upon the land claimed, and it must also appear that it was not a mere casual entry, but made *animo clamandi*, intending to assert his claim, and was followed by a possession, continuous and actual, by means of residence, improvement, cultivation, or other open, notorious, and habitual acts of ownership.⁶⁸

It is admitted that an entry into one of several parcels of land in the same county may avail as an entry into all, provided the entry is made in the name of all, and the several parcels are, as to the freehold, in the hands of the same person. But if the freehold is in different parties, or if it be in different counties, or if the entry is not made in the name of all parcels, it is good for no more than the parcel actually entered upon. Hence, if there be three several disseisors of different parcels, as each is a several tenant of the freehold of his parcel, there must be a separate entry upon every one, and not upon one in the name of all. So, also, there must be a separate entry if a disseisor of an entire parcel let the land for life, say in three parcels, to three several tenants. But if, in the latter case, he should let it for years to three several tenants, an entry into any one of the parcels, in the name of all, will serve for the whole.⁶⁹

And it should be observed that the entry of the equitable owner (e. g., *cestui que trust*) is as effective to repel the bar of the statute of limitations as that of the possessor of the legal title.⁷⁰

⁶⁶ *Allen v. De Groodt*, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626; *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390; *Gregg v. Tesson*, 1 Black, 150, 17 L. Ed. 74.

⁶⁷ 2 Min. Insts. 578; *Clarkson v. Booth*, 17 Grat. (Va.) 489, 490, et seq.

⁶⁸ 2 Min. Insts. 585; *Ewing v. Burnet*, 11 Pet. 53, 9 L. Ed. 624; *Barclay v. Howell*, 6 Pet. 513, 8 L. Ed. 477. The party in possession "cannot be disseised or ousted, except by an actual invasion of his boundary by some act or acts palpable to the senses, and which will serve to admonish him that his seisin is molested; otherwise, he might be disseised of his freehold not only without his knowledge, but without the possibility of his knowing it." *Green v. Pennington*, 105 Va. 806, 54 S. E. 877.

⁶⁹ 2 Min. Insts. 585, 586; 3 Th. Co. Lit. 15 et seq.; *Angell*, Lim. § 377.

⁷⁰ 2 Min. Insts. 586; *Gree v. Rolle*, 1 Ld. Raym. 716.

CHAPTER XXXVI.

TITLE BY PRESCRIPTION.

- § 843. Nature of Title by Prescription.
- 844. Kind of Property Acquirable by Prescription.
- 845. The Prescriptive Period—In General.
- 846. Same—Allowance for Disabilities of Rightful Owner.
- 847. Extent of Right Acquired by Adverse User.
- 848. Continuity of User Necessary.
- 849. Effect of Mere Protests on Part of True Owner upon the Adverse User.
- 850. Notoriousness of Adverse User.
- 851. Exclusiveness of Enjoyment.
- 852. Hostile Character of the User.
- 853. Same—Criterion of Hostile User.
- 854. No Estate Less than One of Inheritance can be Acquired by Prescription.
- 855. Distinction in Pleading between Prescribing in a Que Estate and in Oneself and One's Ancestors.

§ 843. **Nature of Title by Prescription.** By the common law, when a person (and those under whom he claims) has been used to enjoy certain incorporeal property immemorially, that is, for a time such that the memory of man (whether by the proper knowledge of any man living, or by record or sufficient matter of writing) runneth not to the contrary, and his possession has been also honest, uninterrupted and adverse, he acquires thereby what is known as a title by prescription, which is founded on the natural presumption that he who has a quiet and uninterrupted possession for a certain number of years has a just right to the subject possessed, or else he would not have been suffered to continue in the enjoyment of it. Such protracted acquiescence on the part of other claimants in an adverse possession, supposing it to be honest and unaccompanied by fraud, necessarily supposes some good reason, though perhaps unknown, for which the claim was forborne, and requires in sound policy, and with a view to the peace of society, that any opposing title should be regarded as abandoned.¹

§ 844. **Kind of Property Acquirable by Prescription.** Nothing but such things as lie in grant (at common law, incorporeal hereditaments) can be claimed by prescription, such as easements, rights of way, profits a prendre, franchises, rights to the use of water, etc. But no prescription, properly so called, can give title to lands (corporeal hereditaments).²

¹ 2 Min. Insts. 564; 3 Bl. Com. 262; 2 Th. Co. Lit. 198.

² 2 Min. Insts. 566.

The reason for this restriction of prescriptive title to incorporeal rights lying in grant is not easy to discover; the peace and general interests of society requiring that the long and quiet enjoyment of lands should confer a title, no less than the long and quiet enjoyment of incorporeal rights. And so Bracton seems to have laid down the law: "*Longa enim possessio (sicut jus), parit jus possidendi, et tollit actionem vero domino.*"³

But at a very early period the diversity was established, perhaps because of the difference between the modes of transfer of the respective classes of property, the one lying in grant and the other in the higher and more solemn transaction of livery, which might cause an abandonment or surrender of the first to be more readily presumed than of the second; or possibly it may have resulted in consequence of the enactment of a statute limiting actions for lands, and, if not so established, it has at all events been fostered and rendered more prominent by the long succession of such statutes. Thus Lord Coke says: "In ancient time the limitation in a writ of right was from the time of Henry I.⁴ * * * After that by the statute of Merton (20 Hen. III, c. 8), the limitation was from the time of Henry II, and by the statute of Westm. I (3 Edw. I, c. 39), and Westm. II (13 Edw. I, c. 46), the limitation was from the time of Richard I, * * * since altered by a profitable and necessary statute, made anno 32 Henry VIII (c. 2), and by that act the former limitation in time in a writ of right is changed and reduced to sixty years next before the teste of writ; and so of other actions, as by the statute appeareth."⁵

Indeed, the theory of the common law seems to be that title by prescription is nothing more than the conclusive supposition of a grant, which by lapse of time has been lost or destroyed. Hence, if the right in question could not have arisen from a grant at all, the groundwork of the title fails. However, every prescriptive claim may be good, supposing it to be accompanied by honest, uninterrupted, adverse, and immemorial possession, wherever it might by possibility have had a lawful commencement.⁶

³ 2 Min. Insts. 566.

⁴ This would seem to have been by virtue of some statute or assize, which is not extant; the earliest statute whose complete text survives being Magna Charta, or 9 Hen. III. See Hale's Hist. Com. Law, 152, 156, 171, 172; 1 Reeve's Hist. Eng. Law, 264, 316; 2 Reeve's Hist. Eng. Law, 124; 2 Min. Insts. 566.

⁵ 3 Th. Co. Lit. 230; 2 Min. Insts. 566.

⁶ 2 Min. Insts. 567; 2 Bl. Com. 265, note (4); 2 Tiffany, Real Prop. § 445; Lamb v. Crosland, 4 Rich. Law (S. C.) 536; Coolidge v. Learned, 8 Pick. (Mass.) 504; Tracy v. Atherton, 36 Vt. 503; Lehigh Valley R. Co. v. McFarlan, 43 N. J. Law, 605.

So, also, if the right or interest claimed can arise by matter of record alone, then it cannot arise by a mere grant. Thus, in respect to the royal franchises of deodands, of felon's goods, etc., as they are not forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself, or rather the right to the forfeiture, cannot be claimed by an inferior title. On the other hand, the franchises of treasure-trove, waifs, estrays, etc., as they exist in England, may be claimed by prescription; for they arise from contingencies in pais, and not from any matter of record.⁷

And so it is, also, in case of a right common to all, and hence not susceptible of special grant to one. Thus, the right of fishing in the sea being a right common to all, a prescription for such a right annexed to certain tenements is bad.⁸

§ 845. The Prescriptive Period—In General. As has been pointed out, the theory of the common law is that the adverse enjoyment must have continued immemorially, that is, from a time whereof the memory of man runneth not to the contrary, in order that a prescriptive right to the easement or other incorporeal property may arise.⁹

But practically the courts permit such immemorial enjoyment to be conclusively presumed from the proof of an enjoyment for a reasonable period, fixed at common law¹⁰ arbitrarily at twenty years of honest, uninterrupted, notorious, exclusive and adverse enjoyment, and in many of the states in this country, by analogy to the statute of limitations affecting lands, at the period prescribed by the statute.¹¹

In fixing the time or event from which the computation of the period is to commence, we must look to the time at which it first becomes complete; that is, where the other party's use and enjoyment of his land, actual or potential, is first interfered with. Thus, where the question relates to the flooding of lands by a mill dam, the date from which the computation is to commence is the date when the dam is first put in condition to stop the water, and not when the structure was first begun.¹²

§ 846. Same—Allowance for Disabilities of Rightful Owner. In those states which draw their prescriptive period from analogy

⁷ 2 Min. Insts. 567, 568; 2 Bl. Com. 265; 2 Th. Co. Lit. 200.

⁸ 2 Min. Insts. 568; Bac. Abr. Common (A); *Ward v. Cresswell*, Willes, 268.

⁹ Ante, § 843; 2 Min. Insts. 564.

¹⁰ 2 Min. Insts. 566; *Coalter v. Hunter*, 4 Rand. (Va.) 64, 15 Am. Dec. 726.

¹¹ 3 Washburn, Real Prop. (6th Ed.) § 1879.

¹² *Branch v. Doane*, 17 Conn. 402.

to the period contained in the statutes of limitations relating to land, the analogy carries the courts on to the allowance of the same disabilities on the part of the rightful owner as are allowed by those statutes, and subject to the same restrictions.¹³

§ 847. **Extent of Right Acquired by Adverse User.** Since the right claimed is based upon continuous user for the prescriptive period, it follows that the right arises only to the extent of the customary user.¹⁴ While in the case of an easement arising by express grant the language of the grant is to be examined to define and limit the rights of the parties,¹⁵ in the case of an easement arising by prescription, the only way of determining these rights is by reference to the user; that is, the accustomed mode and extent of the enjoyment of the right claimed.¹⁶

Thus, whether one claiming a way over another's land by prescription is entitled to a footway, horseway or carriageway depends upon the mode in which he has been accustomed to use his neighbor's land.¹⁷

§ 848. **Continuity of User Necessary.** The principles that govern the adverse user of the occupant necessary to give him a prescriptive title are for the most part identical with those governing the adverse possession of an occupant of land necessary to give him title under the statute of limitations, which have been discussed pretty fully in the preceding chapter.

Thus it is well settled that the adverse user must be continuous and uninterrupted throughout the prescriptive period, by which is not meant that the user must necessarily continue every moment of the time, day in and day out, but that it must be constant in the sense wherein that term is used when applied to such rights as the one in question (involving the idea that the right of user should never have been abandoned, even for a moment), and that the enjoyment must not have been interrupted by acts of ownership on

¹³ Ante, §§ 821, 822; 2 Tiffany, Real Prop. § 447; Lamb v. Crosland, 4 Rich. Law (S. C.) 536; Melvin v. Whiting, 13 Pick. (Mass.) 185; Edson v. Munsell, 10 Allen (Mass.) 557; Tracy v. Atherton, 36 Vt. 503; Mebane v. Patrick, 46 N. C. 23; Wallace v. Fletcher, 30 N. H. 434; Reimer v. Stuber, 20 Pa. 458, 59 Am. Dec. 744.

¹⁴ 2 Washburn, Real Prop. 41; 2 Tiffany, Real Prop. § 322.

¹⁵ Watts v. C. I. Johnson & Bowman Real Estate Corp., 105 Va. 520, 524, 54 S. E. 317.

¹⁶ 2 Washburn, Real Prop. 41; Watts v. C. I. Johnson & Bowman Real Estate Corp., 105 Va. 520, 524, 54 S. E. 317.

¹⁷ 2 Washburn, Real Prop. 41; Cowling v. Higginson, 4 M. & W. 245; Brunton v. Hale, 1 Ad. & E. 792. See Watts v. C. I. Johnson & Bowman Real Estate Corp., 105 Va. 524, 525, 54 S. E. 317; Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731; Bakeman v. Talbot, 31 N. Y. 366, 88 Am. Dec. 279, note.

the part of the true owner, or of another, that would for the time being have the effect of destroying the adverse occupant's enjoyment, or rendering the right impossible of enjoyment.¹⁸

For instance, a right of way may be acquired by prescription, if the right is exercised at the pleasure of the adverse claimant, though the exercise be only occasional; ¹⁹ whereas, in the nature of things, the enjoyment of light or air adversely, or the use of a drain, would be automatic and more or less continuous night and day.²⁰

Similarly, if the owner of land, over which a right of way is claimed adversely, blocks the right of way so as to render a passage impossible, this destroys the continuity of possession; ²¹ but if he merely renders the passage less convenient than formerly, without blocking it altogether, it would not necessarily result in breaking the continuity.²²

Another instance of break in the continuity of the adverse user may occur where there is a time before the completion of the prescriptive period at which both the dominant and servient estates belong to the same person, for the whole easement, if any there be, is thereby extinguished.²³

It is to be observed that successive adverse users, if there be privity between the successors in adverse enjoyment, may, like successive adverse possessions of land, be tacked the one to the other, so as to aggregate the prescriptive period.²⁴

§ 849. Effect of Mere Protests on Part of True Owner upon the Adverse User. The weight both of reason and authority is in favor of the view that mere protests and expostulations on the part of the true owner will have no effect whatever, so far as concerns the breaking of the continuity of enjoyment by the adverse claimant.

¹⁸ 2 Min. Insts. 564, 566; 2 Tiffany, Real Prop. § 448; *Sears v. Hayt*, 37 Conn. 406; *Webster v. Lowell*, 142 Mass. 324, 8 N. E. 54; *Bodfish v. Bodfish*, 105 Mass. 317; *Messinger's Appeal*, 109 Pa. 290, 4 Atl. 162; *Gerenger v. Summers*, 24 N. C. 229.

¹⁹ *Bodfish v. Bodfish*, 105 Mass. 317; *Cox v. Forrest*, 60 Md. 74.

²⁰ 2 Washburn, Real Prop. 46, 47.

²¹ 2 Tiffany, Real Prop. § 448; *Sears v. Hayt*, 37 Conn. 406; *Barker v. Clark*, 4 N. H. 380, 17 Am. Dec. 428.

²² *Webster v. Lowell*, 142 Mass. 324, 8 N. E. 54; *McKenzie v. Elliott*, 134 Ill. 156, 24 N. E. 965; 2 Tiffany, Real Prop. § 448.

²³ *Ante*, § 107; 2 Tiffany, Real Prop. § 448; *Murphy v. Welch*, 128 Mass. 489; *Stuyvesant v. Woodruff*, 21 N. J. Law, 133, 47 Am. Dec. 156; *Pierre v. Fernald*, 26 Me. 436, 46 Am. Dec. 573.

²⁴ *Ante*, § 827 et seq.; 2 Tiffany, Real Prop. § 446; *Holland v. Long*, 7 Gray (Mass.) 486; *Leonard v. Leonard*, 7 Allen (Mass.) 277; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Bradley's Fish Co. v. Dudley*, 37 Conn. 136; *Dodge v. Stacy*, 39 Vt. 558; *Ross v. Thompson*, 78 Ind. 90.

Indeed, the fact that the owner during twenty years (or the prescriptive period) contents himself with mere protests against the use of his land, when he might and should have taken steps to prevent it, but strengthens the presumption that the adverse claimant has right on his side, and constitutes the enjoyment more hostile than before. Hence the doctrine usually accepted is that such protests cause no breach in the continuity of the adverse claimant's enjoyment.²⁵

§ 850. Notoriousness of Adverse User. The very fact that one party is using the land of another at all is in general a sufficiently notorious fact, or soon becomes so; but cases may arise where the acts of user and enjoyment are secretly done, with the very purpose of working a fraud and surprise upon the owner.

The general principle is the same as in the case of adverse possession. It is not essential that the owner of the land should actually know of the adverse use to which his land is being put; but it is essential that the acts should be open and notorious, so that he may have an opportunity to know of them.²⁶

§ 851. Exclusiveness of Enjoyment. Here, also, the principle is the same in the case of prescription as in the case of adverse possession, namely, that the adverse user must be exclusive, but the application is somewhat different; for the prescriptive right claimed is merely the right to use, not to occupy, the owner's land, and it is by no means necessarily inconsistent with the exclusiveness of the claimant's use of the land that others also claim the right to use it, or that the owner uses it in the same way, provided the claimant's user is based upon a claim of right independent of the others, and provided such other's use of the land does not interrupt his enjoyment of it.²⁷

Thus, where one claims a right of way by prescription over another's land, the fact that there is a road or path over which

²⁵ 2 Tiffany, Real Prop. § 448; *Angus v. Dalton*, 3 Q. B. Div. 93, 4 Q. B. Div. 172, 186; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. Law, 605; *McGeorge v. Hoffman*, 133 Pa. 381, 19 Atl. 413; *Connor v. Sullivan*, 40 Conn. 26, 16 Am. Rep. 10; *Jordan v. Land*, 22 S. C. 159; *Ferrell v. Ferrell*, 1 Baxt. (Tenn.) 329; *Kimball v. Ladd*, 42 Vt. 747; *Okeson v. Patterson*, 29 Pa. 22. *Contra*, *Chicago & N. W. Ry. Co. v. Hoag*, 90 Ill. 339; *Reid v. Garnett*, 101 Va. 47, 43 S. E. 182, 8 Va. Law Reg. 723, note.

²⁶ *Ante*, § 832; 2 Min. Insts. 564, 566; *Olney v. Gardiner*, 4 M. & W. 496, 500; *Tickle v. Brown*, 4 Ad. & E. 369; 2 Washburn, Real Prop. (6th Ed.) § 1254; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877.

²⁷ 2 Tiffany, Real Prop. § 449; *Ballard v. Demmon*, 156 Mass. 449, 31 N. E. 635; *Webster v. Lowell*, 142 Mass. 324, 8 N. E. 54; *Wanger v. Hipple* (Pa.) 13 Atl. 81; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Cox v. Forrest*, 60 Md. 74.

he goes, and that such road or path is used by others, or by the owner, as well as by himself, does not prevent him from acquiring the right by prescription to pass over the way; nor is his acquisition of such right in the least inconsistent with a like acquisition by others, either by grant or prescription, the right of each being exclusive of the rights of the others.²⁸

But if his user be merely in common with the rest of the community, or with a certain class, and under no individual claim of right, while he might thus, in England, perhaps, and in some of these states, claim a right by local custom, he could claim none by prescription.²⁹

§ 852. Hostile Character of the User. The user must be hostile or adverse to the true owner; that is, it must not be by his permission or license, though it is not essential that it should be actually against his will or consent (which would involve the owner's actual knowledge of the adverse user).³⁰

It is also essential, in order that the user may be adverse, that it be such as would give rise to a right of action or of legal redress on the part of the owner of the land, since otherwise he would have no power legally to break the continuity of the user, and would be deprived of his rights without the power to prevent it.³¹

Thus the use of a public highway by an individual, though he use it for the prescriptive period, gives him no private right of way over the land, should the public way be abandoned or discontinued; for the owner could have brought no action against him to prevent his user, so long as the way is public. But, should he continue the

²⁸ See authorities supra.

²⁹ *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Cobb v. Davenport*, 32 N. J. Law, 369; *Prince v. Wilbourn*, 1 Rich. Law (S. C.) 58; *Burnham v. McQuesten*, 48 N. H. 446.

³⁰ 2 *Tiffany*, Real Prop. § 450; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Ward v. Warren*, 82 N. Y. 265; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Demuth v. Amweg*, 90 Pa. 181; *Conyers v. Scott*, 94 Ky. 123, 21 S. W. 530; *Lanier v. Booth*, 50 Miss. 410; *Conner v. Woodfill*, 126 Ind. 85, 25 N. E. 876, 22 Am. St. Rep. 568; *Reimer v. Stuber*, 20 Pa. 458, 59 Am. Dec. 744.

³¹ *Gilmore v. Driscoll*, 122 Mass. 199, 207, 23 Am. Rep. 312; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470; *Emery v. Raleigh & G. R. R. Co.*, 102 N. C. 210, 9 S. E. 139, 11 Am. St. Rep. 727; *Mitchell v. City of Rome*, 49 Ga. 19, 15 Am. Rep. 669; *Turner v. Hart*, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243. But the fact that he could in his action recover only nominal damages is immaterial, since he may thereby none the less vindicate his rights. *Bollivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711.

use after the highway is abandoned, he might then, after the lapse of the prescriptive period, acquire a right thereto.³²

§ 853. **Same—Criterion of Hostile User.** The principles enunciated in the preceding section afford an excellent working criterion whereby to determine in most cases whether there may be a title by prescription at all in a given case, and, if so, when the prescriptive period begins to run.

Since one cannot in general be deprived of his enjoyment of his own property by a mere user of another, unless and until he has had an opportunity to prevent such user by legal process,³³ it follows that there can be no hostile or adverse user, such as is essential to title by prescription, until there has accrued to the owner of the land a right by action or other legal process to prevent such user. Hence the accrual of the right of action or other legal redress may be taken as the starting point of a title by prescription, and as the criterion by which to determine whether a particular easement or other incorporeal hereditament may be acquired by prescription at all.³⁴

Thus, if a lower riparian owner, during the prescriptive period, appropriates an excessive quantity of water from a stream, this would not give him a prescriptive right thereto as against an upper proprietor, who would have no legal means of preventing it, except by appropriating the water himself.³⁵ So one cannot acquire a prescriptive right to water percolating from other land, nor to a flow of surface water from other land, since no right of action nor of legal process to prevent the use of it accrues to the owner of the land from which the water flows.³⁶

So it is, also, in this country, at least, with regard to the doctrine of ancient lights. One cannot, by receiving light into his windows over a vacant lot for twenty years (or the prescriptive period), ac-

³² 2 Tiffany, Real Prop. § 450; Webster v. Lowell, 142 Mass. 324, 8 N. E. 54; Wheeler v. Clark, 58 N. Y. 267; Whaley v. Stevens, 27 S. C. 549, 4 S. E. 145; Black v. O'Hara, 54 Conn. 17, 5 Atl. 598.

³³ Ante, § 852.

³⁴ See cases cited *infra*.

³⁵ 2 Tiffany, Real Prop. § 451; Sampson v. Hoddinott, 1 C. B. (N. S.) 590; Stockport Waterworks Co. v. Potter, 3 Hurl. & C. 300; Thurber v. Martin, 2 Gray (Mass.) 394, 61 Am. Dec. 468; Pratt v. Lamson, 2 Allen (Mass.) 275, 288; Parker v. Hotchkiss, 25 Conn. 321. See Leonard v. St. John, 101 Va. 752, 45 S. E. 474.

³⁶ Ante, §§ 59, 119; Chasemore v. Richards, 7 H. L. Cas. 349; Broadbent v. Ramsbotham, 11 Exch. 602; Greatrex v. Hayward, 8 Exch. 291; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Frazier v. Brown, 12 Ohio St. 294.

quire a prescriptive right to the continued use of such light, and prevent the owner of the lot from building thereon; for the first party's use of the light is not actionable, nor remediable by any proceeding at law, but only by his placing some physical obstruction upon his own lot, which the law should not compel him to do if he does not wish it.³⁷ And the same principle applies to prevent a prescriptive right from attaching in the case of support for a building by adjacent land or by another building.³⁸

Applying the same criterion, a prescriptive right may be acquired as against a reversioner, though he has never been in possession of the land at any time during the adverse user, if he has during that period the right to institute legal proceedings to stop the adverse user.³⁹

So the fact that the user was commenced by permission or license of the owner rebuts the adverse character of the user, unless it be established that the permission or license was withdrawn by the owner or repudiated by the claimant before the prescriptive period commenced to run, in which case a right of action would have accrued to the owner.⁴⁰

§ 854. No Estate Less than One of Inheritance can be Acquired by Prescription. A tenant for life, for years, or at will, cannot prescribe, by reason of the imbecility of his estate. For, as prescription is usage beyond legal memory, it is absurd that such a tenant should pretend to prescribe for anything, when his estate commenced within the memory of man. These particular tenants, therefore, must prescribe by virtue of the previous enjoyment of the right, pleading that J. S. and his ancestors had immemorially used to have the right in question (e. g., a right of common), as appurtenant to the land, and that J. S. had leased the land to the

³⁷Ante, § 118; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Haverstick v. Sipe*, 33 Pa. 368; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629; *Pierre v. Fernald*, 26 Me. 436, 46 Am. Dec. 573; *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Napier v. Bulwinkle*, 5 Rich. Law (S. C.) 311.

³⁸2 *Tiffany*, Real Prop. § 451; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Richart v. Scott*, 7 Watts (Pa.) 460, 32 Am. Dec. 779; *Mitchell v. City of Rome*, 49 Ga. 19, 15 Am. Rep. 669; *Sullivan v. Zeiner*, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730. But see *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, 25 Am. Dec. 524; *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243.

³⁹*Cross v. Lewis*, 2 B. & Cr. 686; *Reimer v. Stuber*, 20 Pa. 458, 59 Am. Dec. 744. See *Ward v. Warren*, 82 N. Y. 265; *Pentland v. Keep*, 41 Wis. 490.

⁴⁰*Eckerson v. Crippen*, 110 N. Y. 585, 18 N. E. 443, 1 L. R. A. 487; *Pitzman v. Boyce*, 111 Mo. 397, 19 S. W. 1104, 33 Am. St. Rep. 536; *Thoenke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030.

particular tenant for the term, etc. And, indeed, even a tenant in fee simple, when he claims by prescription a right appurtenant to land, must allege in pleading his seisin in fee, and then aver that he and all those whose estate he hath in the land, from time whereof the memory of man is not to the contrary, had, and of right ought to have had, the privilege in question, which is termed, from the phrase, "those whose estate he hath," prescribing in a que estate.⁴¹

§ 855. **Distinction in Pleading between Prescribing in a Que Estate and in Oneself and One's Ancestors.** When one prescribes in a que estate (that is, in himself, and those whose estate he has), nothing can be included in his claim but such things as are appendant or appurtenant, that is, incident to lands; for it would be absurd to claim anything as the consequence or appendix of an estate with which the thing claimed has no connection. But if he prescribed in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant, not only things appurtenant to land, but also things in gross. Thus he may prescribe in a que estate for a right of common appurtenant to a certain tract of land, but for a common in gross he can prescribe only in himself and his ancestors.⁴²

⁴¹ 2 Min. Insts. 567; 2 Bl. Com. 264, 265; *Mellor v. Spateman*, 1 Saund. 346.

⁴² 2 Min. Insts. 568; 2 Bl. Com. 266; *Mellor v. Spateman*, 1 Saund. 346.

CHAPTER XXXVII.

TITLE BY CONVEYANCE—I. ALIENATION IN GENERAL.

- § 856. Nature of Alienation in General.
- 857. Subject-Matter of Alienation.
- 858. Incapacity to Aliene of Person Non Compos Mentis.
- 859. Incapacity of Infants to Aliene.
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- 876. Second Device to Evade Statutes of Mortmain.
- 877. Third Device to Evade Statutes of Mortmain.
- 878. Fourth Device to Evade Statutes of Mortmain.
- 879. Corporation as Alienee in the United States.
- 880. Person Attainted of Treason or Felony as Alienee.
- 881. Fiduciary as Alienee.

§ 856. **Nature of Alienation in General.** The most usual method of acquiring a title to real estate, as Blackstone remarks, is that by alienation, conveyance, or purchase in its limited and popular sense, under which may be comprised any method whereby estates are voluntarily resigned by one man, and accepted by another, whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.¹

The general doctrine of the common law, as well in the United States as in England, is that the law of the place where the property is situated—the *lex loci rei sitæ*—exclusively governs real property in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title,

¹ 2 Min. Insts. 635; 2 Bl. Com. 287.

therefore, to real property can be acquired, passed, and lost only according to the *lex loci rei sitæ*.²

Alienation, as a means of acquiring real estate, is not of equal antiquity in the common law of England with that of taking it by descent; for although it is generally admitted that unlimited power of alienation existed prior to the Conquest, in the time of the Saxons, yet the introduction of the system of feuds, which followed close after the Conquest, wrought a total revolution in this particular.³

For we may remember that, by the feudal law, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord, lest thereby a feeble tenant, or one liable to suspicion, might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the lands to his debts; for thus the feudal restraint of alienation would have been easily evaded. And as he could not aliene it in his lifetime, so neither could he by will defeat the succession, by devising the feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his next apparent or presumptive heir. And, therefore, it was very usual in ancient feoffments to express that the alienation was made by consent of the heirs of the feoffor, or sometimes for the heir apparent himself to join with the feoffor in the grant. And, on the other hand, as the feudal obligation was looked upon as being reciprocal, the lord could not aliene or transfer his seignior, without the consent of his vassal; for it was esteemed unreasonable to subject a feudatory, without his own consent, to a new superior, with whom he might have a deadly enmity, or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle by the lord of a neighboring clan. This consent of the vassal was expressed by what was called attorning, or professing to accept the new lord in the tourn or place of the old, which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or

² 2 Min. Insts. 635; Story, Conf. Laws, §§ 424, 428, 434, 464; Minor, Conf. Laws, § 11 et seq.

³ 2 Min. Insts. 635.

tenant refused to attorn to the purchaser, and to become his tenant, the grant or contract was in most cases void, or at least incomplete, which was also an additional clog upon alienations.

But by degrees this feudal severity is worn off, and experience has shown that property best answers the purposes of civil life, especially in commercial countries, where its transfer and circulation are perfectly free and unrestrained.⁴

§ 857. **Subject-Matter of Alienation.** At common law, a grantor can convey no title to lands, unless it be fortified and sanctioned by the possession. The naked right, whether it be the right of possession or the right of property, is not capable of being conveyed, lest it should enable the great men of large social and political influence to obtain pretended titles, whereby justice might be trodden down, and the weak oppressed. But this principle does not hinder reversions and vested remainders from being granted, nor contingent remainders, where the owner is ascertained, because the possession of the particular tenant is the possession of him in remainder or reversion.⁵

This doctrine of the common law remains in full force in this country in those states that have not legislated on the subject.⁶

§ 858. **Incapacity to Aliene of Person Non Compos Mentis.** According to Lord Coke, the phrase "non compos mentis" expresses any and every kind of mental aberration, and is, he says, the "most sure and legal" for that purpose, including (1) idiots, who from their nativity are wanting in understanding; (2) lunatics, who sometimes have understanding and sometimes not; (3) persons nonsane, who by sickness, grief, or other accident have wholly lost their memory and understanding; and (4) persons drunken, who by their own vicious act have for a time deprived themselves of their understanding and memory.⁷

In modern times nonsane persons include idiots and lunatics, the latter word being commonly used to signify all who, by any event supervening after birth, are deprived of their understanding, wheth-

⁴ 2 Min. Insts. 635; 2 Bl. Com. 287, 288.

⁵ 2 Min. Insts. 640, 641; 2 Bl. Com. 290, note (6). And by the English statute of "pretensed titles" (that is, pretended titles), 32 Hen. VIII, c. 9, no person was allowed to convey or take, or to bargain to convey or take, any pretended title to lands or tenements, unless the grantor, or those under whom he claimed, shall have been in possession of the same, or of the reversion or remainder thereof, one year next before, under penalty of forfeiting the whole value of the lands, etc. 2 Min. Insts. 641; 4 Bl. Com. 125, 136.

⁶ 1 Washburn, Real Prop. (6th Ed.) § 103.

⁷ 3 Th. Co. Lit. 45, 46; 2 Min. Insts. 642.

er with or without lucid intervals; whilst persons drunken are assigned to a separate class.⁸

A very remarkable doctrine is recognized by Littleton and Lord Coke as undoubted law,⁹ namely, that if a nonsane person executes a conveyance he shall not plead his want of reason (although his heir may) to invalidate his conveyance, because "no man of full age shall be received in any plea by the law to disable his own person," to which was sometimes added the further reason that, if he were really out of his senses, he could not know whether he had made the conveyance or not.¹⁰

To the credit of the law this doctrine has been, in later times, absolutely and wholly repudiated and abandoned; and it is admitted that in all cases the party himself, as well as his heir, may invalidate any conveyance, or other contract, made whilst in a state of mental aberration.¹¹

In respect to the amount of mental weakness or disturbance which will invalidate a conveyance or other contract, the rule is the same as in the case of wills. Mere weakness of understanding is no objection to a man's disposing of his own estate. Courts cannot measure people's capacities, nor examine into the wisdom and prudence of their property dispositions. If a man be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his actions. The test of legal capacity is said to be that the party is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the objects of his bounty. But, of course, the particular act must be attended with the consent of his will and understanding; for although the person may labor under no legal incapacity to do a valid act, or make a contract, yet if the circumstances of the whole transaction taken together, mental weakness being one of them, show that consent, the very essence of the act, was wanting, it is not valid.¹²

Much less derangement or weakness of mind is sufficient to make a deed voidable (as for fraud) than is necessary to render it absolutely void (for want of an agreeing mind), and in the first instance, if the grantee or a purchaser from him takes without no-

⁸ 2 Min. Insts. 643; post, § 861.

⁹ 3 Th. Co. Lit. 44 et seq.

¹⁰ 2 Min. Insts. 643; 2 Bl. Com. 291, 292; Beverley's Case, 4 Co. 123b.

¹¹ 2 Min. Insts. 643; 2 Kent, Com. 451; 2 Bl. Com. 292, note (9); 1 Story, Eq. Jur. § 227.

¹² 2 Min. Insts. 643; Greer v. Greer, 9 Grat. (Va.) 332, 333; Stevens v. Van Clieve, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; Stewart v. Lispenard, 26 Wend. (N. Y.) 255.

tice of the intellectual defects of the grantor, he acquires a good title, or at least he must be placed in statu quo as a condition of setting aside the conveyance. The circumstances of the case must be looked to.¹³

Derangement of mind must be proved by him who alleges it; but if general derangement be once established, and an act is alleged to have been done in a lucid interval, the burden of proof is on the party alleging such lucid interval to show sanity and competence at the time of the act. And the evidence applying to such interval ought to go to the state and habit of the person, and not relate to a casual interview, as to the degree of self-possession in the particular act.¹⁴

§ 859. **Incapacity of Infants to Aliene.** Whilst some contracts of an infant are valid and a few are void,¹⁵ the great bulk of his business transactions are voidable at the election of the infant upon attaining his majority, and to this latter class belongs for the most part an infant's conveyance of his land; ¹⁶ that is, an infant's conveyance of land is effectual to transfer the title thereto, unless it be repudiated by him after attaining his majority, which may be done even though the grantee has meanwhile conveyed to a bona fide purchaser without notice.¹⁷

At common law, since the conveyance, if of a freehold, must have been accompanied by livery of seisin, it could be repudiated by the infant only by an act of equal solemnity; that is, by entry.¹⁸

¹³ Jackson v. Counts, 106 Va. 12, 54 S. E. 870; Clark, Cont. 268.

¹⁴ 2 Min. Insts. 644; 1 Greenleaf, Ev. § 42; Atty. Gen. v. Paruther, 3 Bro. Ch. 441; Fishburne v. Ferguson, 84 Va. 87, 108, 4 S. E. 575.

¹⁵ 1 Min. Insts. 510 et seq.

¹⁶ 2 Min. Insts. 644; 1 Min. Insts. 510 et seq.; 2 Kent, Com. 235; Mustard v. Wohlford, 15 Grat. (Va.) 337, 76 Am. Dec. 209; Tucker v. Moreland, 10 Pet. 71, 9 L. Ed. 345, 1 Am. Lead. Cas. 251; Dolph v. Hand, 156 Pa. 91, 27 Atl. 114, 36 Am. St. Rep. 25, note; Jackson v. Carpenter, 11 Johns. (N. Y.) 539; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 573, note. As to validity of a marriage settlement executed by an infant, in respect to personal and real estate, respectively, in England and in this country, see Smith v. Smith, 107 Va. 116 et seq., 57 S. E. 577.

¹⁷ 2 Tiffany, Real Prop. § 502. Mustard v. Wohlford, 15 Grat. (Va.) 329, 340, 76 Am. Dec. 209; Irvine v. Irvine, 9 Wall. 617, 19 L. Ed. 800; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 582, 661, note; Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Slaughter v. Cunningham, 24 Ala. 260, 60 Am. Dec. 463; Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 409; Logan v. Gardner, 136 Pa. 588, 20 Atl. 625, 20 Am. St. Rep. 939.

¹⁸ 2 Tiffany, Real Prop. § 502; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Jackson v. Burchin, 14 Johns. (N. Y.) 124; Rogers v. Hurd, 4 Day (Conn.) 57, 4 Am. Dec. 182. See Irvine v. Irvine, 9 Wall. 617, 19 L. Ed. 800.

But in modern times any act manifesting clearly an intention to repudiate the conveyance is regarded as sufficient.¹⁹ Thus, not only an entry,²⁰ but also the institution of an action of ejectment by the infant to recover the land,²¹ or the institution by him of a suit to cancel the conveyance,²² or an inconsistent conveyance subsequently made by him to another person,²³ all constitute sufficient evidence of the infant's intention to repudiate the conveyance, provided the acts of repudiation occur after he becomes of age.²⁴ And, on the other hand, if after he comes of age he expressly confirms the conveyance, or unequivocally recognizes it as valid, he is thenceforward precluded from repudiating it.²⁵ But, according to the better opinion, the fact that he merely fails to repudiate the conveyance within a reasonable time after he comes of age does not of itself operate as an affirmation of a conveyance made during his minority. For that purpose, such quiescence must continue for the period required for the running of the statute of limitations.²⁶

¹⁹ 2 Tiffany, Real Prop. § 502.

²⁰ *Inhabitants of Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233.

²¹ *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 583, note.

²² *Gillespie v. Bailey*, 12 W. Va. 70, 89, 29 Am. Rep. 445; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1.

²³ *Mustard v. Wohlford*, 15 Grat. (Va.) 329, 76 Am. Dec. 209; *Tucker v. Moreland*, 10 Pet. 58, 71, et seq., 9 L. Ed. 345, 1 Am. Lead. Cas. 251; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 665, note.

²⁴ *Zouch v. Parsons*, 3 Burr. 1794; *Tucker v. Moreland*, 10 Pet. 75, 9 L. Ed. 345, 1 Am. Lead. Cas. 251; *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 664 et seq., note; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409. If the infant die without having either repudiated or affirmed the conveyance, his heirs (if the infant's estate be one of inheritance) or his personal representative (if the estate be less than inheritance) may repudiate it. 2 Tiffany, Real Prop. § 502; *Austin v. Trustees of Charlestown Female Seminary*, 8 Metc. (Mass.) 196, 41 Am. Dec. 497; *Bozeman v. Browning*, 31 Ark. 364; *Gillenwaters v. Campbell*, 142 Ind. 529, 41 N. E. 1041; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221.

²⁵ 2 Tiffany, Real Prop. § 502; *Keegan v. Cox*, 116 Mass. 289; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Cox v. McGowan*, 116 N. C. 131, 21 S. E. 108; *Allen v. Poole*, 54 Miss. 323.

²⁶ *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381; *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709; *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 675, note; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *McMurray v. McMurray*, 66 N. Y. 175; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Dono-*

It will be remembered that the fact that the infant is a married woman at the time of the conveyance, and executes the same under a statute permitting married women to convey upon conforming with certain requirements, does not deprive her of this right or privilege of repudiating the conveyance after coming of age; it being a settled rule of construction of such statutes that they are designed to obviate the one disability of coverture, and not the other and additional disability of infancy.²⁷

§ 860. **Same—Conveyance of Infant's Lands in the United States by Statute.** The common-law disability of an infant in the matter of aliening lands, while intended as a protection to his youthful inexperience, frequently operated as a hardship upon him, when for any good reason it became necessary or beneficial to his interest to convey, lease or mortgage his property, so that statutes have been enacted in most of the states authorizing the conveyance or exchange, the lease, or the incumbrance of an infant's lands by a proceeding in equity instituted by the guardian of the infant. The procedure, being statutory, should be in substantial compliance with the statute in every particular, though, being remedial, the statutory requirements are to be construed liberally.²⁸

§ 861. **Incapacity of Person Intoxicated to Aliene.** The plea of drunkenness was formerly regarded with as little favor in civil as it still is in criminal cases. For although Lord Coke classes a drunkard as non compos mentis, yet he allows him no indulgence on that account. "As for a drunkard," says he, "who is voluntarius dæmon, he hath (as has been said) no privilege thereby, but what hurt or ill he doth, his drunkenness doth aggravate it."²⁹

But for more than a century this rigorous doctrine has been much relaxed, and it is agreed that drunkenness invalidates, or renders voidable, all contracts and transactions where (1) the drunkenness was brought about by the opposite party; (2) a fraudulent advantage was taken of it; (3) it deprived the party of his reason, and of an agreeing mind. Although, in this last case, the inebriate

van v. Ward, 100 Mich. 601, 59 N. W. 254; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441. But see cases cited in note to Craig v. Van Bebber, supra.

²⁷ Ante, § 286; 2 Min. Insts. 654; Thomas v. Gammel, 6 Leigh (Va.) 9; Walsh v. Young, 110 Mass. 396; Sandford v. McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; Greenwood v. Coleman, 34 Ala. 150; Watson v. Billings, 38 Ark. 278, 42 Am. Rep. 1; Epps v. Flowers, 101 N. C. 158, 7 S. E. 680; McMorris v. Webb, 17 S. C. 558, 43 Am. Rep. 629.

²⁸ 3 Washburn, Real Prop. (6th Ed.) § 2054; Cochran v. Van Surly, 20 Wend. 365, 32 Am. Dec. 570.

²⁹ 3 Th. Co. Lit. 46; 2 Min. Insts. 644, 645; Beverley's Case, 4 Co. 124b; 1 Plowd. Com. 19.

may be made liable for necessities, like a lunatic, upon a promise implied.³⁰

The mere fact that one is drunk when he enters into a contract is no ground for setting it aside, at least in equity, unless under one or the other of the circumstances above stated;³¹ but when a person's habitual addiction to intoxication renders him extremely subject to imposition, such habits, though not carried to an excess constituting absolute incapacity, lay a ground for strict examination whether any instrument executed by him does not in itself, or in the attendant circumstances, contain evidence that advantage was taken of those habits.³²

If the grantor's drunkenness has been brought about by the grantee, or if the latter has taken advantage of it (even though the grantor has not lost his reason because of the intoxication), these are such flagrant badges of fraud on the part of the grantee as to render the conveyance voidable both at law and in equity.³³

But if the intoxication at the time of the conveyance is so complete as to deprive the grantor of reason and of an agreeing mind, it would seem upon principle, without reference to the question of fraud, that the conveyance should be wholly void, not merely voidable, as in the other cases, since there is (by supposition) an absolute want of understanding and agreeing mind, without which there can be no contract.³⁴

§ 862. Incapacity of Person under Duress to Aliene. In order to give validity to a contract, the law requires the free assent of the party to be charged. Indeed, without freedom of will and choice,

³⁰ 2 Min. Insts. 645; 1 Chitty, Cont. 192; Smith, Cont. 202; 1 Parson, Cont. 311, note (n); Story, Cont. § 86; Gore v. Gibson, 13 M. & W. 625 et seq.

³¹ 2 Min. Insts. 645; Johnson v. Medlicott, 3 P. Wms. 130; Cory v. Cory, 1 Ves. Sr. 19; Cooke v. Clayworth, 18 Ves. 15 et seq.; Rich v. Sydenham, 1 Ch. Cas. 202.

³² 2 Min. Insts. 645; Say v. Barwick, 1 Ves. & B. 199; Dunnage v. White, 1 Swanst. 150; Mountain v. Bennet, 1 Cox, 355; Samuel v. Marshall, 3 Leigh (Va.) 572.

³³ 2 Min. Insts. 645; Johnson v. Medlicott, 3 P. Wms. 130, note (A); Cory v. Cory, 1 Ves. Sr. 19; Cooke v. Clayworth, 18 Ves. 15, et seq.; Gregory v. Frayser, 3 Campb. 454; Brandon v. Old, 3 Carr. & P. 410; Reynolds v. Waller, 1 Wash. (Va.) 164, 194.

³⁴ 2 Min. Insts. 646; Pitt v. Smith, 3 Campb. 33; Fenton v. Holloway, 1 Stark. 126; Brandon v. Old, 3 Carr. & P. 440; Gore v. Gibson, 13 M. & W. 625; Cooke v. Clayworth, 18 Ves. 16; Samuel v. Marshall, 3 Leigh (Va.) 572; Johns v. Fritchey, 39 Md. 258; Bates v. Ball, 72 Ill. 108. But it must be admitted that a strong array of authority is in favor of the view that the conveyance in such case is voidable merely. See cases cited in note to Wade v. Colvert, 2 Mill, Const. (S. C.) 27, 12 Am. Dec. 653.

it is absurd to talk of consent or of contract at all. An agreement or conveyance, therefore, extorted by violence or terror, is voidable by him who is subjected to such constraint. But, although it is immaterial whether the constraint proceeds from the other contracting party, or from his agent, or some one acting by collusion with him, yet, if no connection is shown to exist between the other contracting party and the perpetrator, the validity of the contract is not affected by any violence, nor, in general, by any fraud of which the latter, being such stranger, may have been guilty.³⁵

And so, on the other hand, the general rule is that the duress must be suffered by the party who enters into the contract, and that if a stranger, not under its influence, enter into an agreement, in order to obviate the duress which another undergoes, the agreement is good. But it seems that the duress to a wife or child would avoid a contract, given under its influence, by the husband or parent.³⁶

Duress may consist either of actual violence, or threat thereof,³⁷ and may therefore consist in (1) duress of imprisonment, and (2) duress of threats (*per minas*).³⁸

The actual violence which constitutes such duress resolves itself always into illegal imprisonment, which may be in the common prison, or elsewhere, provided only it is a restraint of the person, and is unlawful, or, if lawful, undue and illegal force be used, or the party is made to endure unnecessary and unlawful privation, as want of food, etc., and in order to free himself from such unlawful restraint, or privation, is induced to make the contract, etc.³⁹

Duress *per minas*, or by threats, on the other hand, is where the party enters into a contract, induced thereto by a reasonable fear, occasioned by threats of (1) loss of life; (2) loss of member or mayhem; (3) grievous bodily hurt; or (4) imprisonment.⁴⁰ But a menace of a mere battery, or of a trespass on lands or goods, is not duress, and consequently does not affect the validity of a contract induced thereby; for the law considers that such a threat is not sufficient to overcome a firm and prudent man, seeing that adequate redress may be obtained for such injuries, whereas, for serious and actual personal violence, no damage can be an adequate compensa-

³⁵ 2 Min. Insts. 646; 1 Chitty, Cont. 269; Bac. Abr. Duress (B); Talley v. Robinson, 22 Grat. (Va.) 896.

³⁶ 2 Min. Insts. 646; 1 Chitty, Cont. 269; Bac. Abr. Duress (B).

³⁷ 1 Bl. Com. 136, 137.

³⁸ 2 Min. Insts. 646.

³⁹ 2 Min. Insts. 646, 647; 1 Bl. Com. 136, 137; 1 Chitty, Cont. 269; Cadaval v. Collins, 4 Ad. & E. 858.

⁴⁰ 2 Min. Insts. 647; 1 Chitty, Cont. 269; Bac. Abr. Duress (A).

tion, and, therefore, even a man of ordinary firmness may be unable to withstand the threat and immediate danger of such personal mischief.⁴¹

It is laid down in the old books⁴² that a threat to burn one's dwelling is not duress, such as to avoid a bond, etc., made under its influence, because adequate amends may be recovered. But it may well be doubted whether, in modern times, that principle would prevail; burning a dwelling being not only an offence in some circumstances capital, but being incapable of adequate reparation in damages, and seriously endangering life.⁴³

So a threat to prosecute for felony a friend or near relation does not constitute such duress as to avoid a note given in consequence of the threat and in order to avert the prosecution.⁴⁴

§ 863. Incapacity of Married Woman to Aliene—At Common Law. Partly upon the theory that at law the wife is one with her husband and that her identity is merged in his, and partly upon the theory that in matters of business in which both are concerned a married woman seldom persistently maintains an opinion and will adverse to her husband, or, in other words, is under her husband's constraining influence,⁴⁵ the common law adopts the general rule that a married woman can make no contract nor conveyance, such acts being absolutely void—and this, even though the husband have deserted the wife, or though they live apart by consent, or though they be divorced a mensa, etc.⁴⁶

⁴¹ 2 Min. Insts. 647; 1 Chitty, Cont. 269, 270; Bac. Abr. Duress; Atlee v. Backhouse, 3 M. & W. 642, 650; Astley v. Reynolds, 2 Stra. 917; Skeate v. Beale, 11 Ad. & E. 983.

⁴² Bac. Abr. Duress; 3 Th. Co. Lit. 69.

⁴³ 2 Min. Insts. 647; 1 Chitty, Cont. 272.

⁴⁴ 2 Min. Insts. 647; Keckley v. Union Bank, 79 Va. 465, 466.

⁴⁵ 2 Min. Insts. 648; ante, § 282.

⁴⁶ 2 Min. Insts. 651; Bac. Abr. Bar. & F. (M); 1 Th. Co. Lit. 133, 134; Marshall v. Rutton, 8 T. R. 545; Nurse v. Craig, 2 Bos. & P. (N. R.) 148; Hyde v. Price, 3 Ves. Jr. 433; Lewis v. Lee, 3 B. & Cr. 291; Hookham v. Chambers, 3 Br. & B. (7 E. C. L.) 92; Bogget v. Frier, 11 East. 303; Kay v. Duchesse de Pienne, 3 Campb. 123.

To this general doctrine, however, there are some marked exceptions. Thus, for her own protection and advantage, a married woman is allowed to act as a feme sole—

(1) Where her husband is civiliter mortuus.

At common law this happens when he is attainted of treason or felony, has abjured the realm, or is banished or transported. 2 Bl. Com. 121; 4 Bl. Com. 380; Portland v. Progers, 2 Vern. 104; Newsome v. Bowyer, 3 P. Wms. 38; Lean v. Schutz, 2 W. Bl. 1198; Carrol v. Blencow, 4 Esp. 27.

(2) Where the husband is an alien enemy. Deerly v. Duchess of Mazarine, 1 Salk. 116. But see De Wahl v. Braune, 1 H. & N. 181.

(3) Where the husband is an alien and has never been in this country. See

Hence any device, which would make possible a conveyance by a married woman, must surmount or elude these two obstacles—the merger of the wife's legal identity in the husband's and his constraining influence upon her. By an act of Parliament it might have been done with entire facility; but an act of Parliament was not easily obtained in the earlier stages of the law, and meanwhile the daily needs of society pressed strongly for the recognition of married women's alienations in some form.⁴⁷

.. § 864. **Same—Use of Fines and Common Recoveries.** As shown in the preceding section, an act of Parliament not being practicable, the courts and lawyers were put to their invention. It was observed that no principle forbade a married woman to be sued, and so her oneness with her husband might be obviated by a collusive suit brought by the intended grantee against the feme covert and her husband, in which there might be, by compromise, or by default, a judgment rendered for the land. And as to the husband's constraint, it was easy to elude that objection by an examination of the wife, before judgment was allowed to be entered, so as to satisfy the court that she understood the transaction and freely assented to it. And thus, by the device of fines and common recoveries, but especially of fines, the desired end was achieved; nor was any parliamentary method introduced (notwithstanding the American precedents) until by 3 and 4 Wm. IV, c. 74, aided by 8 and 9 Vict. c. 106, and 19 and 20 Vict. c. 108, a married woman was enabled to convey, as with us, with far greater facility and cheapness, by deed, executed with the concurrence of her husband, and accompanied by a privy examination and acknowledgment before certain public functionaries.⁴⁸

§ 865. **Same—Married Woman's Equitable Separate Estate.** While the common law, as pointed out in the preceding sections, viewed with great strictness the married woman's incapacity, the court of equity, at quite an early period, undertook in some cases to give her much greater freedom in respect to her equitable separate estate. The principle established in equity was that, in the cases

Kay v. Duchesse de Pienne, 3 Campb. 123; Marshall v. Rutton, 8 T. R. 545; 1 Bl. Com. 443. note (42).

The former doctrine, laid down in Walford v. Duchesse de Pienne, 1 Esp. 554, and Franks v. Duchesse de Pienne, 1 Esp. 558, that the wife may act as a feme sole whenever the husband is an alien, if he has gone abroad, is overruled. Cases supra; Barden v. Keverberg, 2 M. & W. 61, 64; 1 Chit. Cont. (11 Am. Ed.) 252, 253.

⁴⁷ 2 Min. Insts. 652.

⁴⁸ Ante, § 282; 2 Min. Insts. 653; 2 Bl. Com. 355; Williams, Real Prop. 226.

proper for the application of the principle, the intention of the party who created the equitable estate in the wife should control, at least in large measure, the question whether the wife should be permitted to convey the property so given her, and the method by which such conveyance should be effected.

Property thus bestowed upon the wife is known as her equitable separate estate, and for its creation it is essential that the intention should be manifest to settle it upon the wife to her separate use, free from the control of her husband.⁴⁹

The whole doctrine of the equitable separate estate is the creature of equity, and sets at naught all or most of the principles of the common law touching the marital relation, and also touching property generally. Thus a wife may be enabled to dispose of her separate estate as freely, and with less solemnity, than a feme sole, to charge it merely by implication, as a feme sole cannot do, and may also be restrained from conveying or charging it at all, a restraint adverse to one of the most settled doctrines of the general law of property.⁵⁰

In respect to the power of alienation of a wife's separate estate, a distinction is made between real and personal property.⁵¹

As to personal property, the *jus disponendi* is incident to it in the fullest manner. The wife may dispose of it absolutely at her pleasure, by deed or will, as if she were a feme sole, unless the instrument which creates the estate and vests it in her shall impose restrictions, and then these restrictions will constitute the law of the case.⁵²

In respect to real property, her power of disposition is more circumscribed. If she is not in terms allowed, by the instrument which clothes her with the separate estate, to aliene it in some designated way, she can do so only by will duly executed (for which she must be given statutory capacity), or by deed executed with the formalities prescribed for married women (which will be considered in the following section).⁵³ And, it seems, though permit-

⁴⁹ 1 Min. Insts. 345 et seq.; *Jones v. Jones*, 96 Va. 749, 32 S. E. 463.

⁵⁰ Ante, § 519; 2 Min. Insts. 648; 1 Min. Insts. 345 et seq., 351, 355 et seq.; 2 Bl. Com. 293, note (12).

⁵¹ 2 Min. Insts. 648; 1 Bishop, Mar. & Div. §§ 860, 869, note (1).

⁵² 2 Min. Insts. 648; 1 Th. Co. Lit. 132, note (N); 2 Story, Eq. Jur. § 1393; *Grigby v. Cox*, 1 Ves. Sr. 518; *Peacock v. Monk*, 2 Ves. Sr. 191; *Feltiplace v. Gorges*, 1 Ves. Jr. 46, note (a); *Wagstaff v. Smith*, 9 Ves. 520; *Essex v. Atkins*, 14 Ves. 547; *Major v. Lansley*, 2 Russ. & My. 355; *Penn v. Whitehead*, 17 Grat. (Va.) 503, 94 Am. Dec. 478.

⁵³ Ante, § 282; post, § 866; 2 Min. Insts. 649; *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721.

ted to aliene otherwise than in pursuance of the statute, she is not thereby precluded from adopting the statutory mode.⁵⁴

The rents and profits of her separate real estate constitute personalty, and may be disposed of accordingly, unless invested in lands.⁵⁵

Where the wife has the power of disposition, she may bestow her separate property as well on her husband as on a stranger, and that not by giving it to a third person to give to him, but by conveyance directly to himself (unless where she conveys under the statute). But a court of equity will not give sanction or effect to a conveyance to the husband, without first subjecting the wife to a privy examination, and adopting such other precaution as shall seem needful to ascertain her freedom of action.⁵⁶

As to the wife's power to charge her equitable separate estate, the English doctrine is that, although a married woman is incapable, in general, of charging her person during the coverture with any engagement whatsoever, yet, as she may dispose of her separate estate in chattels as if she were sole, she may charge it also at her pleasure, unless restricted by the instrument creating the estate. And not only may she charge it directly and expressly, but also by implication. Thus, if a married woman promise to pay money, or to do a collateral thing, the promise, so far as her person is concerned, is merely void; but if she has separate personal estate, or, indeed, real estate either, she is considered as intending by the promise, whether verbal or written, to charge the estate with it. For, it is argued, she must have intended something by her promise; and as she must be taken to know that she could not charge her person by it, the promise must be construed (*ut res valeat*, etc.) as designed to pledge her separate estate, notwithstanding the difficulty of conceiving upon what principle she can charge her estate thus, by implication, when she is admitted not to be sufficiently a free agent to bind her person by express words.⁵⁷

§ 866. **Same—Married Woman's Statutory Conveyance in the United States.** From an early date statutes have existed in this

⁵⁴ 2 Min. Insts. 649; *Lee v. Bank of United States*, 9 Leigh (Va.) 209.

⁵⁵ 2 Min. Insts. 649; 2 Bright, *Husb. and Wife*, 224 et seq.; *Hume v. Hord*, 5 Grat. (Va.) 374; *Southby v. Stonehouse*, 2 Ves. Sr. 610; *Hearle v. Greenbank*, 1 Ves. Sr. 301; *Hodsden v. Lloyd*, 2 Bro. Ch. 534; *Churchill v. Dibben*, 9 Sim. 447.

⁵⁶ 2 Min. Insts. 649; 2 Story, *Eq. Jur.* §§ 1395, 1396; 2 Bright, *Husb. and Wife*, 257; *Grigby v. Cox*, 1 Ves. Sr. 518; *Essex v. Atkins*, 14 Ves. 542; *Tykes v. Smith*, 1 Ves. Jr. 189; *Muller v. Bayly*, 21 Grat. (Va.) 521.

⁵⁷ 2 Min. Insts. 650; 2 Bright, *Husb. and Wife*, 252 et seq.; *Hulme v. Tenant*, 1 Bro. Ch. 16, 1 White & Tud. Lead. Cas. Eq. 361 et seq.; *Murray v. Barlee*, 3 My. & K. 223; *Owens v. Dickinson*, 1 Cr. & Phil. 53, 54, note (13).

country by which the deeds of married women have been effectual, not only to bar their inchoate rights of dower, but also to convey their separate estates, statutory or equitable. These statutes substitute certain formalities in the execution or acknowledgment of a deed for the fines and common recoveries of the common law; and in some cases, the recordation of such a deed is a prerequisite to its validity. As the legislation on the subject is by no means uniform, the statutes must be studied locally for their provisions.

The allowance of such a conveyance is an exception to the general principles of the common law, and must for that reason be strictly construed. A literal compliance with the prescribed forms is not, indeed, required; but any substantial departure therefrom, in whatever particular, will wholly invalidate the instrument.⁵⁸

It is to be noted that these statutes only remove the disability of coverture for the purpose of conveying the land or of barring dower. Consequently they do not by implication enable a married woman to bind herself by any covenant in her deed, nor to estop herself thereby.⁵⁹

§ 867. Incapacity of Person Attainted of Treason or Felony to Convey. At common law, persons attainted of treason or felony are incompetent to convey from the time of the offence committed, because from that time the lands are liable to be forfeited to the crown.⁶⁰

The common-law rule is not in force in the United States. Nevertheless Congress has passed several acts, known as "Confiscation Acts," under which property is subject to forfeiture. Under one of these acts, land used for insurrectionary purposes with the consent of the owner may be judicially declared forfeited, and the fee may be sold, notwithstanding the provision of the United States Constitution which declares: "No attainder of treason shall work

⁵⁸ *Hepburn v. Dubois*, 12 Pet. 375, 9 L. Ed. 1111; *McGlennery v. Miller*, 90 N. C. 215. "Nor does the fact that she has received the consideration and kept it, or induced the purchaser to make expensive improvements, suffice to pass the title." 3 Washburn, Real Prop. (6th Ed.) § 2101. See *Daniel v. Mason*, 90 Tex. 240, 38 S. W. 161, 59 Am. St. Rep. 815.

⁵⁹ *Perkins v. Richardson*, 11 Allen (Mass.) 539. But some of the statutes go further than merely to give effect to the deed, and they permit the grantor (married woman) to bind herself by her covenants. 3 Washburn, Real Prop. (6th Ed.) § 2106.

As an example of the strictness with which these statutes are construed: A power to convey by a deed executed according to certain formalities will not enable a married woman to convey by attorney, although the power of attorney be executed with the formalities prescribed for the deed. *Kearney v. Macomb*, 16 N. J. Eq. 189; *Wright v. Blackwood*, 57 Tex. 644.

⁶⁰ 2 Min. Insts. 655, 589; 2 Bl. Com. 290.

corruption of blood or forfeiture, except during the life of the person attainted.”⁶¹

§ 868. **Incapacity of an Alien to Convey.** At common law aliens may take lands by purchase, or act of the party, but not by descent, which is an act of the law; nor can they, although they may take by purchase, hold even in that case. Hence, as lands in the possession of an alien are always liable to be forfeited, he can at common law make no good title thereto.⁶²

In this country the disabilities of aliens have been removed in whole or in part by state statutes, and in some cases by foreign treaties. But, even where the disabilities of alienage still exist, an alien may hold land acquired by purchase until office found, and meanwhile pass a good title thereto.⁶³

§ 869. **Incapacity of a Corporation to Convey.** In England corporations acquiring lands without license from the crown, contrary to the statutes of mortmain, are, by those statutes, liable to forfeit the same, and therefore can convey no perfect title thereto.⁶⁴

But generally in this country, even where the law expressly prohibits a corporation from “acquiring” more than a certain amount of real estate, if, notwithstanding, it does acquire more, and then transfers the same, such transfer is valid, and passes a good title to the purchaser, upon the theory that, if the corporation has violated the law, it is for the state to complain thereof through a writ of quo warranto or other proceeding for the revocation of the charter, or possibly for the escheat of the land (as being without a lawful owner), but private persons cannot take advantage of the corporation’s violation of law.⁶⁵

§ 870. **Incapacity to be Alienee—In General.** Lands may in general be aliened to any person whomsoever; the exceptions be-

⁶¹ Article 3, § 3, par. 2. The Supreme Court held that under Act Aug. 6, 1861, c. 60, 12 Stat. 319, the fee in the property could constitutionally be confiscated by virtue of the power given to Congress to make rules concerning captures on land and water (article 1, § 8). The confiscation is not a punishment meted out to the owner for his act, but is decreed because the property has been devoted to insurrectionary purposes and must suffer the consequences. *Kirk v. Lynd*, 106 U. S. 315, 1 Sup. Ct. 296, 27 L. Ed. 193.

⁶² 2 Min. Insts. 655, 656; 2 Bl. Com. 293.

⁶³ 1 Washburn, Real Prop. (6th Ed.) §§ 131, 132; 1 Dembitz, Land Titles, 303. See *Haley v. Sheridan*, 190 N. Y. 331, 83 N. E. 296; *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532.

⁶⁴ 2 Min. Insts. 589 et seq., 656; 2 Bl. Com. 268.

⁶⁵ *Chesapeake & O. R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633, 914; *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; *Mallett v. Simpson*, 94 N. C. 37, 55 Am. Rep. 595. But see 2 Min. Insts. 596.

ing fewer than in the case of persons aliening, because every conveyance is supposed to be for the benefit of the grantee.⁶⁶

Thus persons wanting in understanding or in freedom of will may take as alienees; and as it is usually for the alienee's benefit, the conveyance will be commonly good until the party, being restored to competency, shall plainly declare his intention to waive it. Thus, an infant or nonsane person may be a grantee, with the privilege, upon the removal of his disability, to agree to or avoid it, without any cause shown; a privilege which descends also to his heir, if he dies before the removal of the disability, or before agreeing to the transaction. And so, when a married woman is grantee, the conveyance is not void, as it is where she is grantor, but continues good during coverture, unless avoided by the husband's dissent, and, after the coverture ended, may be avoided or confirmed by her or her heirs.⁶⁷

§ 871. **Same—Grantee Insufficiently Designated.** Persons insufficiently designated, so that it is not reasonably certain who is intended, can take nothing by any sort of conveyance. So, if the beneficial object for which the conveyance is designed be undefined, the conveyance is void. Hence a conveyance to an unincorporated association (as a religious congregation, etc.), or to the unborn bastard child of such a man, or for an object of general philanthropy (as the establishment of a place of education, or the benefit of the trade of a town), is independently of statute, inoperative and void.⁶⁸

§ 872. **Same—Alienee Dead at Time of Transfer.** A deed to a grantee who is dead at the time the deed is executed is void at common law for want of a grantee, and the fact that the deed is to the dead man "and his heirs" does not carry title to his heirs, because those words were not intended to be words of purchase, but merely words of limitation, describing the estate of the grantee; it being intended that the heirs should take, if at all, by descent only from the grantee, and not as purchasers under the deed.⁶⁹

⁶⁶ 2 Min. Insts. 656; 2 Bl. Com. 292; 2 Th. Co. Lit. 214; Sheppard's Touchst. 235.

⁶⁷ 2 Min. Insts. 656; 2 Bl. Com. 292; 2 Th. Co. Lit. 214, 215; Sheppard's Touchst. 235. Even an infant *en ventre sa mere*, if sufficiently described, may take as a grantee in a deed. See *Morris v. Caudle*, 178 Ill. 9, 52 N. E. 1036, 44 L. R. A. 489, note, 69 Am. St. Rep. 282.

⁶⁸ Ante, § 463 et seq.; 2 Min. Insts. 657.

⁶⁹ 1 Devlin, Deeds, § 187; *Lewis v. McGee*, 1 A. K. Marsh. (Ky.) 199; *Hunter v. Watson*, 12 Cal. 363, 376, 73 Am. Dec. 543. See, also, *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130; *Simmons v. Spratt*, 22 Fla. 370. It would probably be otherwise, if the deed were to the dead grantee "or his heirs."

Independently of statute, the same rule applies to a devise, so that if a devisee is dead at the time the testator executes the will, or, indeed, if he dies at any time before the death of the testator himself, the devise is void, or, in technical language, lapses, and the heirs of the dead devisee are not entitled to the property thus devised, even though expressly mentioned.⁷⁰

§ 873. **Alien as Alienee.** The common law, under no circumstances, permitted aliens to hold lands, save that persons engaged in trade might hire habitations and houses of business; and any alien who presumed to acquire any permanent estate in real property, whether in fee simple, for life, or for years, was liable to have the same immediately escheated to the crown.⁷¹

We have already seen that the disabilities of alienage have to a large extent been removed in this country by statute.⁷²

§ 874. **Corporation as Alienee—In England.** Alienation in mortmain (in mortua manu) is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been in early times made chiefly by religious houses (e. g., monasteries, etc.), in consequence whereof the lands became perpetually inherent in one dead hand (monks being esteemed civilly dead), this has occasioned the general appellation of mortmain to be applied to alienations to all corporations, and the religious houses themselves to be principally considered in forming the statutes of mortmain. And it will be curious, in deducing the history of these statutes, to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the pertinacity with which successive Parliaments pursued them through all their artifices; how now remedies still begot new evasions, till the Legislature at last, though not without repeated failures, obtained a decisive victory.⁷³ By the common law, after the feudal restraints upon alienation were worn away, any man might dispose of his lands to any other private person at his own discretion, and a corporation is as capable of purchasing as an individual.⁷⁴

But in consequence of feudal policy, in part, but also from high considerations of general expediency, it was always, and in England still is, necessary for corporations to have license in mortmain from

⁷⁰ Post, § 1030 et seq.

⁷¹ Ante, § 868; 2 Min. Insts. 658; 1 Min. Insts. 164 et seq. See *Elmendorff v. Carmichael*, 3 Litt. (Ky.) 472, 14 Am. Dec. 97, note.

⁷² Ante, § 868.

⁷³ 2 Min. Insts. 590; 2 Bl. Com. 268.

⁷⁴ 2 Min. Insts. 590, 591; 1 Th. Co. Lit. 188 et seq.; *Case of Sutton's Hospital*, 10 Co. 306.

the crown, to enable them, not indeed to purchase, but to hold, lands; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits by the vesting of lands in tenants that can never be attainted or die. And, indeed, such licenses in mortmain seem to have been necessary before the Norman Conquest.

But besides this general license from the king, as lord paramount of the kingdom, it was also requisite, whenever there was an intermediate lord between the king and the alienor, to obtain his license, also (upon the same feudal principles), for the alienation of the specific land. And if no such license was obtained, the king or other lord might respectively enter on the land so aliened in mortmain as a forfeiture. Yet such were the influence and ingenuity of the clergy that (notwithstanding this fundamental principle) the most considerable dotations to religious houses happened within less than two centuries after the Conquest.⁷⁵

§ 875. Same—First Device to Evade Law of Mortmain. The first device in order to evade the necessity for a license seems to have been this: The tenant who meant to alienate, first conveyed his lands to the religious house, and instantly took them back again to hold as tenant to the monastery, which kind of instantaneous seisin was probably held not to occasion any forfeiture, and then, by pretext of some other forfeiture, or escheat accruing in consequence of the feudal relation, the society entered into these lands in right of such their newly acquired seignior, as immediate lords of the fee. But when these dotations began to grow numerous, it was observed that the feudal services ordained for the defence of the kingdom were every day visibly withdrawn, that the lords were curtailed of the fruits of their seignories, their escheats, wardships, reliefs, etc., and that the circulation of landed property from man to man (a vastly important element of prosperity in every state) began to stagnate; and, therefore, in order to arrest those mischiefs, it was ordered by the second of Henry III's great charters, and afterwards by that printed in the statute book (9 Hen. III, c. 36, A. D. 1225), which, by the way, is the earliest English statute now extant, that none should "give his lands to any religious house" and that all such contrivances should be void, and the land be forfeited to the lord of the fee.⁷⁶

§ 876. Same—Second Device to Evade Statutes of Mortmain. As the prohibition contained in Magna Charta extended only to

⁷⁵ 2 Min. Insts. 591; 2 Bl. Com. 268, 269; 1 Stephens, Com. 422.

⁷⁶ 2 Min. Insts. 591, 592; 2 Reeves, Hist. Eng. Law, 84, 85; 2 Bl. Com. 269, 270; 1 Stephens, Com. 422, 423, note (g); 1 Stats. at Large, 9 Hen. III, c. 36.

religious houses, bishops, and other sole corporations, were not included therein; and the aggregate ecclesiastical bodies also found means to creep out of this statute, by buying in lands that were bona fide holden of themselves, as lords of the fee, and thereby evading the forfeiture, or by taking long leases for years. This was the second device adopted in order to evade the necessity for a license. It was speedily met by the statute *de religiosis* (7 Edw. I, St. 2, A. D. 1279), which provided that no person, religious or other, whatsoever, should buy or sell, or receive under pretence of a gift or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself any lands or tenements in mortmain, upon pain that the immediate lord of the fee, or on his default for one year, the lords paramount, and in default of them, the king, might enter thereon as for a forfeiture.⁷⁷

§ 877. Same—Third Device to Evade Statutes of Mortmain. Notwithstanding the solicitude with which this statute seems to have been penned, a method of evasion (their third device) was soon discovered by the ecclesiastics. This was to recover lands by default, in a collusive suit brought by the religious house against the person who had in contemplation to bestow lands in mortmain; for although this proceeding, being by consent, was in fraud of the policy of the law, yet, as the statute 7 Edw. I, extended only to gifts and conveyances between the parties, the justices held that the religious and ecclesiastical persons did not appropriate such lands *per titulum doni vel alterius alienationis*, as it was expressed in the statute, and that they were not within the words *aut alio quovismodo arte vel ingenio*, because, the recoveries being prosecuted in a course of law, they were presumed to be just and lawful, and therefore it was determined that they were not within the statute. And thus the ecclesiastics had the honor of inventing those fictitious adjudications of right, which constituted for several centuries the great assurance of the kingdom, under the name of common recoveries. But upon this Parliament intervened again, and by statute Westm. II, 13 Edw. I, c. 32 (A. D. 1285), enacted that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and, if the religious house or corporation be found to have it, they shall still recover seisin, otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the default of the immediate or other lord; and when, in the eighteenth year of the same sovereign, the statute *quia emptores* was passed, allowing all men to

⁷⁷ 2 Min. Insts. 592; 2 Bl. Com. 270; 1 Stephens, Com. 423; 2 Reeves, Hist. Eng. Law, 154.

alienate their lands, a proviso was inserted that this should not extend to authorize any kind of alienation in mortmain.⁷⁸

§ 878. **Same—Fourth Device to Evade the Statutes of Mortmain.** The fourth device was more ingenious and more far-reaching in its consequences than any of the preceding. For almost a hundred years after 13 Edw. I, c. 32 (A. D. 1285), the clergy were constrained to content themselves with such acquisitions of lands as they could obtain a license for from the crown. In the latter part of the reign of Edward III, however (say about A. D. 1370), they fell upon a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees (whom in modern times we should style trustees) to the use of the religious houses, thus distinguishing between the possession and the use, and themselves receiving the actual profits, while the seisin of the land remained in the nominal feoffee, who was held by the courts of equity, after some fluctuations, to be bound in conscience to account to his cestui que use (so the beneficiary was called) for the rents and profits of the estate. And it is to this invention, the idea of which was derived from the *fidei commissa* of the Roman law, that the Anglican world is indebted for the introduction of uses and trusts, the nature of which we have already seen,⁷⁹ and which enter so largely into modern property arrangements. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device, for the statute 15 Rich. II, c. 5 (A. D. 1392), enacts that the lands which had been so purchased to uses should be amortised (that is, conveyed in mortmain) by license from the crown, or else be aliened to some other use, and that all future purchases in that way were to be considered as within the statutes of mortmain. And civil or lay, as well as ecclesiastical, corporations are also declared to be within the mischief, and of course within the remedy, provided by those laws.⁸⁰

The clergy, finding that the Legislature was as persistent in annulling and obviating their contrivances as they had been fruitful and ingenious in devising them, now gave up the contest, and no more attempted to thwart the settled policy of the realm.⁸¹

§ 879. **Same—Corporation as Alienee in the United States.** The English statutes of mortmain are not in force in this country, except in Pennsylvania.⁸² The charters of corporations, however, generally limit the amount of real property they may acquire.

⁷⁸ 2 Min. Insts. 592, 593; 2 Bl. Com. 271.

⁷⁹ Ante, § 397 et seq.; 2 Min. Insts. 204 et seq.

⁸⁰ 2 Min. Insts. 593, 594; 2 Bl. Com. 271, 272; 1 Stephens, Com. 425; 3 Reeves, Hist. Eng. Law, 178, 179.

⁸¹ 2 Min. Insts. 594.

⁸² 2 Kent, Com. 283.

These statutes are liberally construed, and according to the prevailing opinion, if a corporation purchase land in excess of its needs, the title is notwithstanding good in the corporation, even as to the excess, except perhaps at the instance of the state itself, in a proceeding instituted directly for the purpose of depriving the corporation of the property, as by escheat; and even this is very doubtful. Indeed, the better opinion seems to be that while the state may for such cause institute a proceeding in the nature of a quo warranto, or an equivalent procedure, to forfeit the charter of the corporation, the title to the land itself remains in the corporation or its alienees, and upon the dissolution of the corporation its property does not go to the state by way of escheat for lack of owners, but after payment of debts is to be divided among the stockholders in proportion to the shares they hold.⁸³

§ 880. Persons Attainted of Treason or Felony as Alienees. A person attainted of treason or felony may, at common law, before or after attainder, be a grantee; but he cannot hold the thing granted, for, if the king or lord will, he may have it from him by forfeiture or escheat.⁸⁴

In this country attainder of felony nowhere works corruption of blood, and thus a person attainted may not only take, but may hold and dispose of, lands as freely as others.⁸⁵

§ 881. Fiduciary as Alienee. Trustees, agents, attorneys, and other persons occupying a fiduciary relation, cannot lawfully deal for their own benefit touching the subject-matter committed to them; and any such transactions are regarded as constructively fraudulent (however transparently fair they may actually be), and are voidable at the election of the beneficiary.⁸⁶

⁸³ Chesapeake & O. R. Co. v. Walker, 100 Va. 69, 40 S. E. 633, 914; Bogardus v. Trinity Church, 4 Sandf. Ch. 633, 757.

⁸⁴ Ante, § 785; 2 Min. Insts. 588, 659; 2 Th. Co. Lit. 214; 3 Preston, Abst. 407.

⁸⁵ 3 Washburn, Real Prop. (6th Ed.) § 1858; Carpenter's Estate, 170 Pa. 203, 32 Atl. 637, 29 L. R. A. 145, 50 Am. St. Rep. 765; Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935, 25 L. R. A. 564.

A doctrine which bears some resemblance to the common-law "corruption of blood" has been enunciated in New York. It was held, on the ground that no one should be allowed to take advantage of his own wrong, that one killing his ancestor for an estate which would naturally come to him by the statute of descents could not inherit. 3 Washburn, Real Prop. (6th Ed.) § 1858, citing Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819.

⁸⁶ 2 Min. Insts. 659; 1 Story, Eq. Jur. § 311 et seq.; 3 Sugden, Vendors, 225; Fox v. Mackreth, 2 Bro. Ch. 400, 2 Cox, 320, 1 White & Tud. Lead. Cas. Eq. 105, 126, et seq.; Buckles v. Lafferty, 2 Rob. (Va.) 294, 40 Am. Dec. 752; Michoud v. Girod, 4 How. 554, 11 L. Ed. 1076. See ante, § 424 et seq.

CHAPTER XXXVIII.

TITLE BY CONVEYANCE CONTINUED—II. THE DEED.

- § 882. Circumstances under Which a Deed is Required.
 - Common-Law Doctrine.
- 883. Doctrine in England under Statute of Frauds.
- 884. Doctrine in the United States by Statute.
- 885. General Nature of a Deed.
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§ 882. **Circumstances under Which a Deed is Required—Common-Law Doctrine.** No writing was required at common law for any form of conveyance, except for the conveyance of incorporeal rights by way of grant—a form of conveyance whose use at common law was confined to the transfer or creation of those rights which were incapable of passing by livery of seisin, and which were therefore said to lie in grant.¹ Otherwise, for the transfer of terms for years, nothing was required but a verbal agreement, consummated by the lessee's taking possession, whether the lessor were present or not, or whether he were living or not; for the transfer of freeholds there must have been an agreement in presenti, and an actual delivery of the possession of the freehold by the vendor to the vendee, i. e., a livery of seisin. Hence lands, as to the immediate freehold thereof, were said to lie in livery.²

Contracts to convey either a freehold or a term for years may, at common law, be by parol, without any writing whatever.³

§ 883. **Same—Doctrine in England under Statute of Frauds.** Under the English statute of frauds and perjuries, 29 Car. II, c. 3, §§ 1-4, all original estates of freehold, and for a term exceeding three years, can be conveyed only by a deed or writing; and all assignments, whether of leases for years, or for life, and all surrenders of the same must also be by deed or note in writing. Freeholds, however, must be accompanied by livery of seisin. Those not exceeding three years can be conveyed by parol agreement and entry, as at common law.⁴

Contracts for future conveyances, or for future leases, for any interest whatever in lands, are by section 4 of the statute, required

¹ Post, § 968; ante, § 132.

² Ante, §§ 132, 320; 2 Min. Insts. 660, 80, 184; 2 Bl. Com. 144; 1 Th. Co. Lit. 630, note (6), 318, note (T); 2 Th. Co. Lit. 404, note (A), 224, note (A).

³ Ante, § 321; 2 Min. Insts. 660; 1 Th. Co. Lit. 628, 630, note (6); Maldon's Case, Cro. Eliz. 33; Benton v. Crowell, Cro. Eliz. 306.

⁴ 2 Min. Insts. 660; 2 Th. Co. Lit. 404, note (A), 566, note (5).

to be in writing, and signed by the party to be charged or his agent.⁵

And by the later statute, 8 & 9 Vict. c. 106 (usually termed "the statute of grants"), it is provided that all lands, as to the conveyance of the immediate freehold thereof, shall lie in grant as well as in livery—that is, shall pass by deed (alone) as well as by livery of seisin.⁶

§ 884. Same—Doctrine in the United States by Statute. By statutes which are generally known as the "statutes of conveyances," and which follow more or less exactly the English statute 29 Car. II, c. 3, §§ 1, 2, 3, a deed is required in nearly every state in this country in order to convey, inter vivos, any freehold estate or for a specified term of years in land.

There are also statutes, known as the "statutes of parol agreements," corresponding to 29 Car. II, c. 3, § 4, by which executory contracts for the sale of land or for the lease thereof for more than a specified time (generally one year) are required to be in writing, signed by the party to be charged, or his agent.

Furthermore, the effect of the statutes of conveyances is that in almost any state a deed which conforms to the requirements of the statute dispenses with the necessity for livery, actual or constructive, and, whether in presenti or in futuro, will be upheld, although it could not be sustained for any reason as a common-law conveyance or as a conveyance under the statute of uses.⁷

§ 885. General Nature of a Deed. A deed (factum) is a writing on parchment or paper, sealed and delivered.⁸

Except under comparatively recent statutes (or, at common law, in case of the conveyance of incorporeal rights by way of grant⁹), the deed does not of itself operate as a conveyance of the realty, but merely as an evidence that it has been conveyed—a mere muniment or evidence of the title, which, while not essential to the validity of the conveyance at common law, was a very common and most important accompaniment thereof, since it gave a much more secure foundation to the title than the memories of witnesses of the livery of seisin could furnish.¹⁰

There were many different modes of conveyance at common law, each appropriate to a particular condition of affairs, such as a "feoff-

⁵ 2 Min. Insts. 660.

⁶ 2 Min. Insts. 660.

⁷ 2 Min. Insts. 661; 3 Washburn, Real Prop. (6th Ed.) § 2264.

⁸ 2 Min. Insts. 661; 2 Th. Co. Lit. 224, 232; Sheppard's Touchst. 50. What is a sealing, and what a delivery, will be explained later. Post, § 920 et seq., 922 et seq. See 2 Min. Insts. 661, 727 et seq., 731 et seq.; 2 Bl. Com. 305 et seq.

⁹ Post, § 968.

¹⁰ Ante, § 132.

ment" to pass a fee simple, a "gift" to create a fee tail, a "lease" wherever there was a reversion in the grantor, an "exchange," a "release," a "surrender," etc., all of which will be considered hereafter.¹¹ Few, if any, of these absolutely required at common law that a deed should accompany them, but to all a deed was the usual accompaniment, because of the additional security thereby given to the title transferred.

It was not until the statute of frauds, 29 Car. II, c. 3, §§ 1, 2, 3, that a deed or writing was required to accompany a conveyance of land, as we have seen.¹²

§ 886. Several Kinds of Deed—Deeds Indented and Deeds Poll. Deeds are either (1) deeds indented, or (2) deeds poll.

A deed indented (or indenture) is a deed inter partes, where the parties on opposite sides mutually stipulate.¹³

A deed indented, or an indenture, is so called because originally all deeds inter partes, where the parties mutually stipulated, were indented or toothed like a saw, on the edge, a practice which is accounted for thus: Formerly, deeds being more concise than they have since become, it was usual to write both parts (each party having a copy—a part, as it was called) on the same piece of parchment, with some word, or letters of the alphabet written between them, through which the parchment was cut, either in a straight or indented line (more frequently the latter), in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists, and with us *chirographa*, or handwritings, the word *chirographum* being usually that which is divided in making the indenture; and this custom was still preserved in England, in making out the indentures of a fine, down to a very recent period (A. D. 1834), when, by statute 3 & 4 Wm. IV, c. 74, fines were abolished. But for many generations past, in ordinary transactions, indenting only is used, or rather cutting the parchment or paper in a waving line on the top or side, without cutting through any letters at all; and it seems now to serve little other purpose than to give name to the species of the deed. Indeed, the better opinion is that it is the deed's being inter partes, that is, containing mutual stipulations between the parties, and not its having its top or side indented, which constitutes an indenture. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually styled the original, and the rest are counterparts; though in modern times it is most frequent for all the parties to execute every part, which renders them all originals.¹⁴

¹¹ Post, § 964 et seq.

¹² Ante, § 883.

¹³ 2 Min. Insts. 662.

¹⁴ 2 Min. Insts. 662, 663; 2 Bl. Com. 295, 296; Williams, Real Prop. 74, 75.

A deed poll, on the other hand, is a deed, the stipulations of which are altogether on one side, without any reciprocal stipulations on the other.¹⁵ It owes its designation to the fact that originally it was not indented on the edge, but smooth (*factum politum*).¹⁶ The deed poll is not, strictly speaking, an agreement between two or more persons, but a declaration under seal by some one or more particular persons respecting an agreement or stipulation made by him or them with some other person or persons.¹⁷

§ 887. **Same—Effect of Deeds Poll and Deeds Indented, Respectively, as to Persons Not Parties Thereto.** A deed poll, whether deriving its effect from the common law or some statute, does, immediately upon its execution by the grantor, divest the estate out of him, and put it in the party to whom it is by the deed appointed to pass, though in his absence, and without notice to him, till some disagreement to such estate appears. No man, indeed, can be forced to take an estate against his will; but the law naturally presumes that every estate is beneficial to the party to whom it is given, and, therefore, that he assents to it until and unless he renounces it. And hence, in such cases, the assent of the grantee is implied, first, because of the supposed benefit; secondly, because it is incongruous and absurd that when a conveyance, at least by a deed poll, is completely executed on the grantor's part, the estate should continue in him; thirdly, and especially, in order to prevent any uncertainty as to where the freehold is vested. Accordingly, while on the one hand acceptance of a deed is not essential to give it validity, dissent is one of the modes of avoiding it.¹⁸

A deed indented, or an indenture, on the other hand, is a mutual agreement between two or more persons, whereby each stipulates for something on his part. And where a conveyance is effected by means of such a deed, although at common law, if a limitation were made by way of remainder to a stranger, not a party to the deed, it is valid if the stranger, upon the determination of the particular estate, enters and agrees to have the lands by force of the indenture,

¹⁵ 2 Min. Insts. 663.

¹⁶ 2 Min. Insts. 663; 2 Bl. Com. 296.

¹⁷ 2 Min. Insts. 900.

¹⁸ 2 Min. Insts. 900, 901; 2 Bl. Com. 309; Sheppard's Touchst. 285; Butler & Baker's Case, 3 Co. 26b, note (E); Townsend v. Tickell, 3 B. & Ald. 31; Garnons v. Knight, 5 B. & Cr. 671; Skipwith v. Cunningham, 8 Leigh (Va.) 281 et seq., 31 Am. Dec. 642. If the grantee accepts a deed, without himself executing it, the deed containing what purports to be covenants on his part to pay notes given for deferred purchase money, his acceptance of the deed binds him to observe such promises or undertakings as are therein imposed upon him, but his obligation is not in the nature of a promise under seal, but a simple contract only. Taylor v. Forbes, 101 Va. 663, 44 S. E. 888.

so that he would thereupon be bound to perform any conditions contained in the indenture; yet no stranger can take, in this case, any present estate in possession, because he is a stranger to the deed.¹⁹

§ 888. Conveyances Made by Agents or Attorneys in Fact under Powers of Attorney. Because of the owner's prolonged absence, or his nonresidence, or for other reasons, it is sometimes necessary or convenient to appoint an agent who may make a valid conveyance of one's land.

An important distinction exists between such an agent or attorney in fact and the ordinary "real estate agent" or broker (whose function is merely to bring the vendor and vendee together) in respect to the form of the authority given them, respectively.

In the case of the real estate agent or broker, his authority is not to convey the land or any interest therein, and need not, therefore, be under seal, nor, independently of statute, even in writing. He performs his duty and is entitled to his commissions when he procures a purchaser who is ready, willing and able to buy upon the terms laid down by the vendor.²⁰

But if the agent's authority extends to the execution of a conveyance in the name of his principal, it is a general rule that one acting under a power of attorney cannot execute for his principal a sealed instrument, unless the power of attorney be sealed. The authority must be equal in dignity and solemnity with the thing to be done.²¹ This is true, even though the agent's authority extends only to the filling in of a blank space in a deed.²²

¹⁹ 2 Min. Insts. 901; 2 Th. Co. Lit. 130, 131; *Ross v. Milne*, 12 Leigh (Va.) 218, 37 Am. Dec. 646.

²⁰ *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683, note; *Barthell v. Peter*, 88 Wis. 316, 60 N. W. 429, 43 Am. St. Rep. 906. Nor can he be deprived of his commissions by a failure of title. Note to *Kalley v. Baker*, 28 Am. St. Rep. 547; *Barthell v. Peter*, supra. And where the agent agrees to receive his commissions ratably out of each payment as made, and there is a clause in the contract of sale providing for a forfeiture of all past payments and the rescission of the contract upon failure of the vendee to meet any payment at maturity, to which the agent assented, upon a default, this stipulation was enforced, and it was held that the agent was not entitled to his commissions upon the future payments. *Murray v. Rickard*, 103 Va. 132, 48 S. E. 871.

²¹ 2 Min. Insts. 730; *Sheppard's Touchst.* 57; 2 Rob. Pr. (2d Ed.) 14 et seq.; *Com. Dig. Attor. (C, 1), (C, 5)*; *Harrison v. Jackson*, 7 T. R. 209; *Elliot v. Davis*, 2 Bos. & P. 338; *Berkeley v. Hardy*, 5 B. & Cr. 355; *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S. E. 36, 43 L. R. A. 806; *United States v. Nelson*, 2 Brock, 64, Fed. Cas. No. 15,863. But see *Butler v. United States*, 21 Wall. 273, 22 L. Ed. 614.

²² 2 Min. Insts. 739; post, § 959.

And although it is an established rule that one partner cannot bind the other partners by deed, without a sealed authority,²³ yet if the deed be made in the partners' presence and by their authority, though oral only, it is good and binding upon them.²⁴ And if it be an act not requiring a sealed instrument (such as the assignment of the personal chattels of the partnership), it seems to be valid where it is done with the partner's consent, although not in his presence, not as the party's deed, but as an instrument of assent.²⁵

It is to be observed that powers of attorney are construed strictly, and, though the intention of the parties is to be considered in construing the language used, the authority of the attorney can never be considered to be greater than that warranted by the language of the instrument or indispensable to the effective operation of such authority. Hence a power of attorney which merely authorizes the agent to demand and receive all real and personal property of the principal does not confer authority to sell and convey his real estate.²⁶

A conveyance made by an attorney in fact ought, according to every consideration of good sense, to be made in the name, not of the attorney, but of the principal; and accordingly the common law reasonably holds conveyances made in the name of the attorney, notwithstanding they purport to be made by him as attorney in fact, to be inoperative to transfer title.²⁷

It has been held, however, that although the words of conveyance were those of the attorney, yet if purporting to be in his capacity as attorney, and the instrument be signed with the name of the principal, by the attorney, it operates to convey the estate; and if the words of conveyance be the words of the principal, the manner of signing it is of no importance. It may be either "P. by A.," or "A. for P."²⁸

In conclusion, it may be remarked that a power of attorney to execute a deed, like any other agency, is revocable at the pleasure of the principal, even though it be expressly stipulated to be ir-

²³ *Harrison v. Jackson*, 7 T. R. 207; 2 Min. Insts. 730.

²⁴ 2 Min. Insts. 730; *Ball v. Dunsterville*, 4 T. R. 313; *Burn v. Burn*, 3 Ves. Jr. 578. The same principle applies to other cases of agency.

²⁵ 2 Min. Insts. 730; *Hunter v. Parker*, 7 M. & W. 341; *Burton v. Burton*, 1 Chit. 707; *Anderson v. Tompkins*, 1 Brock, 462, Fed. Cas. No. 365.

²⁶ *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S. E. 36, 43 L. R. A. 806.

²⁷ 2 Min. Insts. 901; *Bac. Abr. Lease* (I), 10; *Combe's Case*, 9 Co. 75a, 76b; *Frontin v. Small*, 2 Ld. Raym. 1418; *White v. Cuyler*, 6 T. R. 176; *Clarke v. Courtney*, 5 Pet. 349, 8 L. Ed. 140; *Stinchcomb v. Marsh*, 15 Grat. (Va.) 202, 210. See *Shanks v. Lancaster*, 5 Grat. (Va.) 119, 50 Am. Dec. 108.

²⁸ 2 Min. Insts. 730; *Bryan v. Stump*, 8 Grat. (Va.) 241, 56 Am. Dec. 139; *Wilks v. Back*, 2 East, 142.

revocable,²⁹ unless it be coupled with an interest in the land, in which case it is revocable, so long as the interest continues, even without express contract to that effect.³⁰ Like other agencies, also, unless coupled with an interest, it is revoked by the death of the principal.³¹

§ 889. **Competency of Parties to Deed.** The grantor in the deed must, of course, be legally competent to execute the conveyance, and the grantee to receive the land under the deed. This topic of the capacity to aliene and to be an alienee has already been considered, and the student is referred to that discussion.³²

§ 890. **The Form and Formalities of a Deed—Discussion Outlined.** Below³³ is appended a form of an ancient charter or deed

²⁹ *Angle v. Marshall*, 55 W. Va. 671, 679, 47 S. E. 882; *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92, 104 Am. St. Rep. 998. If revoked, there may, of course, be an action upon the breach of the contract.

³⁰ *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232; *Angle v. Marshall*, 55 W. Va. 671, 679, 47 S. E. 882.

³¹ *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232; *Angle v. Marshall*, 55 W. Va. 671, 679, 47 S. E. 882; *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25; *Ferris v. Irving*, 28 Cal. 648.

³² Ante, § 858 et seq., § 870 et seq.

³³ *Ancient Charter or Deed of Feoffment (Deed Poll).*

Premises.

Know all men that I, William, son of William de Segenho, have given, granted, and by this my present deed have confirmed unto John, son of the late John de Saleford, in consideration of a certain sum of money to me in hand paid beforehand, one acre of my arable land, lying in Saleford plain, adjacent to the land of the late Richard de la Mere; to Have and to Hold the whole of the aforesaid acre of land, with all its appurtenances, unto the said John and his heirs and assigns, of the chief lords of the fee; Rendering and doing annually, to the said chief lords therefor, due and accustomed service. And I, the aforesaid William, and my heirs and assigns, the whole of the aforesaid acre of land, with all its appurtenances, to the aforesaid John de Saleford, and his heirs and assigns, against all persons will warrant forever. In testimony whereof, to this present deed I have affixed my seal: In the presence of the following witnesses, Nigel de Saleford, John the miller of the same town, and others. Dated at Saleford, on Friday next before the feast of Saint Mary the Virgin, in the sixth year of the Reign of King Edward, son of King Edward.

L. S.

Livery of Seisin endorsed.

Memorandum, that on the day and year within written, full and quiet seisin of the within specified acre, with the appurtenances, was given, and delivered by the within-named William de Segenho, to the within-named John de Saleford, in their proper persons, according to the tenor and effect of the within-written deed, in the presence of Nigel de Saleford, John de Seybrooke, and others.

of feoffment, which the student is advised to study carefully, as presenting a simple illustration of the formal and orderly parts of a deed of conveyance. For purposes of comparison and study, a form of a modern deed of bargain and sale (in the form of an indenture) is also appended.³⁴

³⁴ *Conveyance of Lands by Bargain and Sale (Indenture.)* (4 Min. Insts. 1596.)

This indenture, made this — day of —, in the year of our Lord 18—, between C. C., of —, and E., his wife, of the one part, and D. D., of —, of the other part—Witneseth, that the said C. C., and E., his wife, for and in consideration of the sum of — dollars to them in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, release and confirm to the said D. D., and his heirs and assigns for ever, with general warranty, all of that certain tract or parcel of land lying in —, and containing by estimation [or by recent survey] — acres, be the same, however, ever so much more or less, and bounded as follows, to wit: Beginning at [describe the boundaries of the land]. Together with all the appurtenances to the said land belonging or in any wise appertaining. To have and to hold the said tract or parcel of land, with its appurtenances aforesaid, unto the said D. D., his heirs and assigns for ever.

And the said C. C., for himself and his heirs, doth covenant and agree with the said D. D., his heirs and assigns, in manner and form following to wit:

That the said C. C. [or "the said C. C., and E., his said wife"] is [or "are"] seised in fee-simple of the said tract or parcel of land, with its appurtenances aforesaid.

That the said C. C., and E., his wife, have good right and lawful power to convey the said tract or parcel of land, with its said appurtenances, to the said D. D. in fee-simple.

That the said D. D., and his heirs and assigns, shall have quiet and peaceable possession of the said land, and its appurtenances aforesaid, for ever.

That the said tract or parcel of land, with its appurtenances aforesaid, is free from all incumbrances and charges whatsoever; and

That the said C. C., and E., his wife, will execute such further assurances of and for the said land, and its appurtenances, as may be requisite to make the title thereto of the said D. D., his heirs and assigns, sure and complete for ever.

Witness the hands and seals of the parties, the day and year first above written.

C. C. [Seal.]

E. C. [Seal.]

D. D. [Seal.]

If there are no stipulations to be made by the grantee, the form of the deed may be altered to that of a deed poll, thus:

(Deed Poll.)

Know all men that C. C., and E., his wife, for and in consideration of — dollars to them in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do grant, bargain, sell, release, and confirm unto D. D., of —, his heirs and assigns, forever, with general warranty, all that tract or parcel of land, etc. [as in the form above, and as no date is mentioned in the beginning, the conclusion would be:]

Witness the hands and seals of the said C. C., and E., his wife, this — day of —, in the year of our Lord 18—.

The various formal parts and formalities of a deed³⁵ are commonly enumerated as follows: (1) Deed must be written on paper or parchment; (2) the premises; (3) the habendum; (4) the tenendum; (5) the reddendum; (6) the conditions; (7) the warranty; (8) the covenants; (9) the conclusion of the deed; (10) the reading of the deed; (11) sealing and signing the deed; (12) delivery of the deed; (13) attestation or acknowledgment of the deed; (14) recordation of the deed.³⁶

§ 891. **I. Deed Written on Paper or Parchment.** A deed may be written or printed in any character or language, and, it is believed, in ink, or with pencil, but it must be upon paper or parchment; for if written on stone, board, linen, leather, steel, or brass, or the like, it is no deed, although it is doubtless a good agreement in writing. Wood, stone, or steel may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities, for there is nothing else so durable, and at the same time so little liable to alteration—nothing so secure from alteration, that is at the same time so durable. It must have also the regular stamps required by the stamp law (if any such enactments are in existence), or else it cannot, perhaps, be given in evidence, and under circumstances may be void.³⁷

§ 892. **II. The Premises.** The premises contain the names of the parties, the recital of whatever circumstances may be needful to explain the reasons of the transaction, the consideration which induced the deed, the recital of payment of purchase money or part

³⁵ It is not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare, clearly and legally, the party's meaning. But as those formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason, or urgent necessity. Frequently the reason for using particular expressions will appear after many years' study, when before, upon a cursory consideration, the words seemed unnecessary, if not improper. 2 Min. Insts. 705; 2 Bl. Com. 298, notes (7), (8); 4 Kent, Com. 460, 461.

³⁶ See 2 Min. Insts. 705; 2 Bl. Com. 298 et seq.

³⁷ 2 Min. Insts. 704; 2 Bl. Com. 297; Chitty, Cont. 72; *Schneider v. Morris*, 2 M. & S. 285 et seq.; *Geary v. Physic*, 5 B. & Cr. 234; *Jeffrey v. Walton*, 1 Stark. 267; *Rymes v. Clarkson*, 1 Phil. 22; *Dickinson v. Dickinson*, 2 Phil. 173; *Green v. Skipwith*, 1 Phil. 53; *Hale v. Wilkinson*, 21 Grat. (Va.) 78; *Talley v. Robinson*, 22 Grat. (Va.) 896; *Campbell v. Wilcox*, 10 Wall. 421, 19 L. Ed. 973; *Carpenter v. Snellings*, 97 Mass. 452.

But that Congress cannot by a stamp act make void a deed purporting to convey land within one of the states (although it might be excluded as evidence of title in the United States courts), see 3 Washburn, Real Prop. (6th Ed.) § 2085.

thereof, and whatever is necessary to make it clearly intelligible what is the subject of the grant and who is the grantor and the grantee.³⁸

While the premises should designate the name of the grantor with reasonable certainty, it is sufficient if the description is accurate enough to identify him, even though the name given in the instrument be not his actual name.³⁹ Thus, a conveyance by "the heirs" of a decedent is good, provided such heirs can be identified;⁴⁰ and a conveyance in the first person, if signed by the grantor in such manner as to identify him, would also be good, at least, if there be only one grantor.⁴¹

But if there are several grantors, as where a husband and wife, or two co-owners, unite in a deed, each grantor should be named in the premises as a grantor in the deed, and the mere signing of the deed by one not so named will not pass his or her interest in the property conveyed.⁴²

Upon the same principle the grantee must be named in the conveyance or so described as to be capable of identification.⁴³ A conveyance to a grantee already dead is, as we have seen, void;⁴⁴ but, if the deed is to the heirs of a dead man, they are susceptible of identification, and the deed is valid.⁴⁵

§ 893. III. **The Habendum.** The function of the habendum is to determine what estate or interest is granted by the deed, although this may be, and generally is, stated in the premises, in

³⁸ 2 Min. Insts. 705; 2 Bl. Com. 298; 2 Th. Co. Lit. 240; Sheppard's Touchst. 52, 74.

³⁹ Jenkins v. Jenkins, 148 Pa. 216, 23 Atl. 985; Houx v. Batteen, 68 Mo. 84; Nicodemus v. Young, 90 Iowa, 423, 57 N. W. 906.

⁴⁰ Blaisdell v. Morse, 75 Me. 542.

⁴¹ 2 Tiffany, Real Prop. § 380; Elliot v. Sleeper, 2 N. H. 525; Jackson v. Root, 18 Johns. (N. Y.) 60; Hutchins v. Carleton, 19 N. H. 487. But see Peabody v. Hewett, 52 Me. 33, 83 Am. Dec. 486.

⁴² Ante, § 866; 2 Min. Insts. 654; 2 Tiffany, Real Prop. § 380; Taylor v. Cussen, 90 Va. 40, 17 S. E. 721; Leavitt v. Lamprey, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; Greenough v. Turner, 11 Gray (Mass.) 334; Batchelor v. Brereton, 112 U. S. 396, 5 Sup. Ct. 150, 28 L. Ed. 748; Laughlin v. Fream, 14 W. Va. 322; Stone v. Sledge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65; Prather v. McDowell, 8 Bush (Ky.) 46; Harrison v. Simons, 55 Ala. 510. But see Elliot v. Sleeper, 2 N. H. 525; Woodward v. Seaver, 38 N. H. 29; Armstrong v. Stovall, 26 Miss. 275; Hrouska v. Janke, 66 Wis. 252, 28 N. W. 166.

⁴³ Ante, § 871; 2 Min. Insts. 657; 2 Tiffany, Real Prop. § 380; Wood v. Boyd, 28 Ark. 75; Simmons v. Spratt, 20 Fla. 495; Hardin v. Hardin, 32 S. C. 599, 11 S. E. 102; Wright v. Lancaster, 48 Tex. 250; Thomas v. Wyatt, 31 Mo. 188, 77 Am. Dec. 640.

⁴⁴ Ante, § 872.

⁴⁵ 2 Tiffany, Real Prop. § 380; Shaw v. Loud, 12 Mass. 447; Gearheart v. Thorp, 9 B. Mon. (Ky.) 31; Boone v. Moore, 14 Mo. 421.

which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict, or be repugnant to the estate granted in the premises. In case of such irreconcilable repugnancy, the premises generally prevail, for the habendum cannot divest an estate already vested by the premises.⁴⁶

Thus, at common law, upon a grant (in the premises) "to A. and the heirs of his body," habendum, "to him and his heirs forever," A. would take a fee tail, with a remainder in fee simple expectant thereon; but had the premises been "to A. and his heirs," habendum, "to him for life," the habendum would be utterly void, for an estate of inheritance is vested in A. before the habendum comes, and is not to be subsequently divested or taken away by it—unless, at least, a contrary intent can be clearly gathered from the whole deed.⁴⁷

§ 894. IV. *The Tenendum.* In modern times, even in England, the tenendum is of little practical use, and in deeds conveying a fee simple is retained only by custom. It was formerly employed to set forth the feudal service to be rendered for the land by the grantee, and also to show of whom the land was to be holden; but as the statute of *quia emptores* (18 Edw. I, c. 1) has caused all fee-simple lands to be held of the chief lords of the fee, and as all tenures, with a few unimportant exceptions, were by 12 Car. II, c. 24, reduced to free and common socage, the occasion for the clause of tenendum, in conveyances in fee simple, has in a great degree passed away, and it is usually pretermitted.⁴⁸

And in this country, where all feudal tenures are abolished, the tenendum is improper, or at least superfluous, in conveyances of the fee simple.

§ 895. V. *The Reddendum.* The function of the reddendum is to set forth the return (*reditus*), which in feudal times, for the most part, accompanied all conveyances, even those in fee simple, being generally military services. The reddendum may still be properly used in conveyances in fee, when (as sometimes happens) an annual or periodical rent is reserved as a compensation or return for the property; and in conveyances for life, for years, or at will, a clause of reddendum is by no means infrequent. A reddendum, it will be observed, must be to the grantors, or some or one of them, and not to any stranger to the deed.⁴⁹

⁴⁶ 2 Min. Insts. 705; 2 Bl. Com. 298; 2 Th. Co. Lit. 241.

⁴⁷ 2 Bl. Com. 298.

⁴⁸ 2 Min. Insts. 706; 2 Bl. Com. 298, 299; 2 Th. Co. Lit. 241, 242, note (R); Sheppard's Touchst. 52, 79.

⁴⁹ 2 Min. Insts. 706; 2 Bl. Com. 299; 2 Th. Co. Lit. 142, note (S); Sheppard's Touchst. 52, 80.

Furthermore, the reddendum or reservation clause is, in this country at least, frequently used for the purpose of retaining in the grantor certain incorporeal rights or easements in the land conveyed.⁵⁰

§ 896. VI. The Condition Clause. It is unnecessary to repeat here the principles controlling conditions, which have already been quite fully examined.⁵¹

In practice, most conveyances in fee simple are unconditional; and, of course, if no conditions are to be stipulated, there will be no condition clause in the deed.⁵²

§ 897. VII. The Ancient Warranty or Covenant Real. "A warranty," says Lord Coke, "is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same; and either upon voucher or by judgment in a writ of warrantia chartæ, to yield other lands and tenements to the value of those that shall be evicted by a former title; or else may be used by way of rebutter;" that is, to repel or rebut the claims of the grantor himself, or of his heirs, to the lands. It extends to no lease for years or to any other chattel, and if proper words of warranty are applied to such interests they are to be construed as creating only a personal covenant.⁵³

Warranty may be either (1) implied, or (2) express.

It is implied wherever, upon the conveyance of a freehold, there is a reversion in the grantor and the land is held of him. At common law, this is the case even in conveyances in fee simple, and, therefore, a warranty at common law is implied in all cases of freehold conveyances, at least where the word "dedi" is used. But

⁵⁰ Ante, § 94; *Clafin v. Boston & A. R. Co.*, 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; *Grafton v. Moir*, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. Rep. 533; *Kister v. Reeser*, 98 Pa. 1, 42 Am. Rep. 608; *Haggerty v. Lee*, 50 N. J. Eq. 464, 26 Atl. 537; *Chappell v. New York, N. H. & H. R. Co.*, 62 Conn. 195, 24 Atl. 997, 17 L. R. A. 420. This is contrary to the common-law idea of a reservation, which was that the grantor thereby reserved to himself some new thing issuing out of the thing granted, not before in esse; e. g., rent. Ante, § 94; *Doe v. Lock*, 2 Ad. & E. 743; *Durham, etc., R. Co. v. Walker*, 2 Q. B. 940. Accordingly, it has been held in England that an easement cannot thus be created by a mere reservation; and where it appears to be so, it is in reality a regrant by the grantee, such an effect not being given to it unless the grantee also has signed the deed. Ante, § 94; *Tiffany, Real Prop.* §§ 316, 383; *Durham, etc., R. Co. v. Walker*, supra; *Wickham v. Hawker*, 7 M. & W. 63; *Corporation of London v. Riggs*, 13 Ch. Div. 798.

⁵¹ Ante, § 466 et seq.

⁵² 2 Min. Insts. 706, 707.

⁵³ 2 Th. Co. Lit. 245, 249, note (D), 250, note (F); 2 Min. Insts. 707; 2 Bl. Com. 300; *Williamson v. Codrington*, 1 Ves. Sr. 516.

when the statute *quia emptores* (18 Edw. I, c. 1) had declared that, upon conveyances in fee simple, the tenure should be, not of the grantor, but of the chief lord of the fee, implied warranty became limited to tenants in tail, for life and for years, although in estates for years it is only a personal covenant; but in the case of freeholds (i. e., of estates tail and for life) a warranty is implied only where the word "*dedi*" is used; and with us, as well as in England, upon a conveyance in fee simple, the grantor is no further liable for the title than he expressly covenants to be, except in case of fraud or material mistake, and except, also, in case of partition or exchange of lands, where either party is evicted of his share, in which case the other and his heirs are bound to warranty, for which no better reason is given than that they enjoy the equivalent in land.⁵⁴

Express technical warranty can be created by no word whatsoever, except "*warrantizo*," or in English "*warrant*." If any other word or phrase be substituted, or be joined with the word "*warrant*" (save only the auxiliary "*will*" or "*shall*"), it is not the ancient "*covenant real*," but becomes a modern personal covenant of title. And so, also, an ancient warranty can be annexed to no estate less than freehold; and hence, if the proper words of warranty be applied to a lease for years, or to any chattel, it is a personal covenant, so that, if a conveyance of land in fee simple comprised chattels also, the same words ("*I will warrant*") are construed as creating an ancient warranty as to the land, and a personal covenant as to the chattels. Hence, if the grantor says "*I will warrant*" the land, etc., it is the ancient warranty; but "*I will warrant and defend*," or "*I covenant or agree to warrant*," or "*I will warrant a term for years*," etc., are modern and personal covenants of title. And it should be observed that an express warranty always supersedes one implied.⁵⁵

Ancient warranty, as it affects the heirs of the warrantor, is of three sorts: (1) *Lineal*; (2) *collateral*; and (3) *commencing by disseisin*.

(1) The *lineal* warranty is that which descends in the same line with the land warranted; that is, in the same line that the land would have descended in, had it not been sold, and that, whether the descent be *lineal* or *collateral*. Thus, if the owner of land sells it

⁵⁴ Ante, §§ —, 83; 2 Min. Insts. 707, 708; 2 Bl. Com. 300; 2 Th. Co. Lit. 252, 253, note (K); Rawle, Cov. Tit. 353 et seq.; Williams v. Burrell, 1 Co. B. 429 et seq.; Black v. Gilmore, 9 Leigh (Va.) 448, 449, 33 Am. Dec. 253.

⁵⁵ 2 Min. Insts. 708; 2 Bl. Com. 301; 2 Th. Co. Lit. 250 et seq. notes (D), (F), 256; Nokes' Case, 4 Co. 80b; Williamson v. Codrington, 1 Ves. Sr. 511; Tabb v. Binford, 4 Leigh (Va.) 132, 26 Am. Dec. 317.

with warranty, and then dies leaving his nephew as his heir, the warranty is lineal, while the descent of it from the uncle to the nephew is collateral.⁵⁶

(2) The collateral warranty means a warranty that descends, not in the same line with the land warranted, but from a different ancestor. Thus, if a tenant by the curtesy or in dower aliene his or her life estate in fee simple with warranty, and then die leaving a son, the common heir of both parents, the warranty is collateral, because it descends from one parent while the land descends from the other.⁵⁷

(3) Warranty commencing by disseisin arises where the very conveyance in which the warranty is found immediately follows an act of disseisin by the warranting ancestor perpetrated against the heir or against the ancestor on the other side, or where the conveyance itself operates as such (as where a father, tenant for years, with remainder to his son in fee, alienes to a stranger in fee simple, with warranty. Such warranty, being founded on tort or wrong of the warrantor himself, is too palpably injurious to be supported, and is not binding, even at common law, upon the warrantor's heirs; for it cannot be presumed that an ancestor unjust enough to commit such a wrong against his heir will be so just as to leave him a recompense. Warranty by disseisin, it will be observed, is in all cases collateral.⁵⁸

§ 898. **Same—Effect of Ancient Warranty as to Compensation Made for Loss of Land by Title Paramount.** The warrantor himself is, of course, always bound to make compensation when the land is lost by title paramount; but when he is dead, the liability of his heir to do so depends, at common law: First, on the fact that he is named in the warranty. "*Hæredes mei*," says Lord Coke, "are words of necessity, for otherwise the heirs are not bound."⁵⁹ And, secondly, on his having assets descended to him from the warranting ancestor. This doctrine applies without discrimination to both lineal and collateral warranty.⁶⁰

The obligation arising out of the warranty on the part of the warrantor and his heirs (supposing the latter to have assets by descent, and to the extent of such assets) is at common law to render for any

⁵⁶ 2 Min. Insts. 708; 2 Bl. Com. 301; 2 Th. Co. Lit. 274, 278, et seq., note (M, 1).

⁵⁷ 2 Min. Insts. 708; 2 Bl. Com. 301, 302; 2 Th. Co. Lit. 274 et seq.

⁵⁸ 2 Min. Insts. 709; 2 Bl. Com. 302; 2 Th. Co. Lit. 297, note (2), 302.

⁵⁹ 2 Th. Co. Lit. 250, note (G); 2 Min. Insts. 709.

⁶⁰ 2 Min. Insts. 709; 2 Bl. Com. 242 et seq., notes; 2 Th. Co. Lit. 186, note (A).

part of the land warranted, lost by title paramount, its equivalent in value in other lands, having reference to the value at the time of the making of the warranty.⁶¹

§ 899. Same—Effect of Ancient Warranty in Rebutting or Estopping the Claims of Warrantor or His Heirs. The claims of the warrantor cannot in general be asserted at common law in opposition to his own warranty, and the claim of his heir is at common law likewise repelled or rebutted by the warranty of the ancestor, whether the heir actually derived any heritage from the warranting ancestor or not, and whether the warranty be lineal or collateral.⁶²

It is to be observed that a covenant real of warranty, when annexed to an assurance by feoffment, fine, or common recovery, had not only the ordinary and personal effect of rebutting or repelling the grantor or his heirs from claiming the land, as by force of the estoppel of the deed, but also the much higher operation actually to transfer and pass to the grantee any estate in the land which the grantor may afterwards have acquired.⁶³

But an after-acquired title, where the assurance is by grant, or by release, or under the statute of uses, is not actually passed by direct operation of law, however the grantor and his heirs under such assurances may be estopped to claim it.⁶⁴

Where, however, the land is conveyed without any warranty at all, the grantor is in general not estopped to set up an after-acquired title, unless there be some claim or representation in the conveyance that the grantor is seised of, or has full power to convey, the estate which the deed purports to convey.⁶⁵

§ 900. VIII. Personal Covenants in the Deed. Covenants, as here used, are stipulations by either party, contained in a deed of conveyance, for the truth of certain facts, or to perform or give something to another. Thus the grantor may covenant that he hath a right to convey, or for the grantee's quiet enjoyment, or the like; the grantee may covenant to pay the purchase money, or to pay rent, or to keep the premises in repair. Covenants in modern times supply the place of ancient warranty, and something more. Thus they may oblige the grantor to be answerable for the

⁶¹ 2 Min. Insts. 713; 2 Th. Co. Lit. 304, 308; 2 Bl. Com. 302.

⁶² 2 Min. Insts. 709, 710, 711.

⁶³ Post, § 1064; 2 Min. Insts. 710; Rawle, Cov. Tit. 319 et seq.; 2 Th. Co. Lit. 353, note (B, i), 456, 457; Sheppard's Touchst. 204, 210; Burtner v. Keran, 24 Grat. (Va.) 66.

⁶⁴ 2 Min. Insts. 710; Rawle, Cov. Tit. 320, 321; Bigelow, Estoppel. 337, 360, et seq.; Doe v. Oliver, 5 M. & R. 202, 2 Smith, Lead. Cas. 511, 514, et seq.; Nye v. Lovitt, 92 Va. 710, 24 S. E. 345. See post, §§ 1064, 1066.

⁶⁵ 2 Min. Insts. 710; post, § 1066 et seq.

goodness of the title he sells, but they may also relate to any other matter; and when they concern the title to the land sold, they have this great advantage over the ancient warranty, that they enable the grantee to charge with damages in money both the personal and real estate of the grantor, if there is a breach of the agreement, whereas the warranty can be redressed by the recovery of lands only.⁶⁶

§ 901. Same—Personal Covenants Not Running with the Land.

Covenants which do not run with the land are such covenants as do not affect the nature, quality or value of the thing conveyed, independently of collateral circumstances, however they may affect the parties collaterally, in respect of other lands owned by them. The designation by which they are described, namely, that they do not run with the land, marks their most distinctive characteristic; that is, that they do not pass with the land to the assignee thereof, either to benefit or to charge him, notwithstanding assigns be specially mentioned.⁶⁷

Thus, where in a lease of land, with liberty to conduct a water course through it, and to erect a silk mill, the lessee covenanted for himself, his executors, etc., and assigns, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate, and afterwards assigned the lease, it was held that the covenant was not one that ran with the land, affecting neither its nature, quality, nor value, and that the assignee was not bound thereby.⁶⁸ So a covenant to pay so much annually for the use of the poor does not run with the land;⁶⁹ nor a covenant to build a house on land other than that conveyed; nor to pay a collateral sum of money (other than rent) to the grantor, or any money to a stranger; nor a covenant to return cattle or cattle of like value, leased with the premises.⁷⁰

It is not enough, however, that the covenant concerns or affects the land conveyed; but, in order to make it run with the land, there must be a privity of estate between the contracting parties. Hence, if mortgagor and mortgagee unite in a lease for years, and the lessee covenant with the mortgagor and his assigns to pay rent and do repairs, and the mortgagee afterwards assign his interest, the assignee can maintain no action against the lessee, because, al-

⁶⁶ 2 Min. Insts. 714; 2 Bl. Com. 304.

⁶⁷ Ante, § 367 et seq., 375 et seq.; 2 Min. Insts. 715.

⁶⁸ 2 Min. Insts. 715; *Mayor of Congleton v. Pattison*, 10 East, 130.

⁶⁹ *Mayho v. Buckhurst*, Cro. Jac. 438; 2 Min. Insts. 715.

⁷⁰ 2 Min. Insts. 715; *Spencer's Case*, 5 Co. 16b, 1 Smith, Lead. Cas. 92, 96, et seq.; Bac. Abr. Covenant (E), 3; Rawle, Cov. Tit. 281 et seq.

though the covenants relate to the land, yet there is no privity of estate between the mortgagee's assignee and the mortgagor with whom the lessee covenanted.⁷¹

For the most part, a covenant which relates to the land runs with it, and an assignee is liable to observe it, although assigns be not named; but as to this doctrine there seems at common law to be this exception: That if the covenant, although it concern the land, yet relates directly to a thing not then in esse, the covenant is not binding on an assignee unless expressly named. Thus, if in a lease the lessee covenants to build a wall on the land, and afterwards assigns, the assignee is under no obligation to erect the wall, unless the covenant were for the lessee and his assigns.⁷²

§ 902. Same—Personal Covenants Affecting Land Not Conveyed. Occasionally cases arise wherein the owner of one tract of land agrees or covenants with the owner of an adjacent tract for the doing or not doing of certain acts upon his land, whereby the adjacent landowner will be benefited, without the transfer or conveyance of any land between them. In such cases the question may present itself how far such covenants or agreements are enforceable by or against not only the original parties to the agreement, but by or against persons subsequently acquiring either tract of land.

Of course, the original parties to such a contract will have all the remedies for its breach, both at law and in equity, that would accrue upon the breach of any other contract.

But, if we suppose either tract to be assigned to a third person, the question whether the covenant may be enforced by or against such assignee presents more difficulty.

Since the covenant does not run with the land (no land having been conveyed at the time the covenant was made), and since the assignee was not a party to the original covenant, it would seem that upon common-law principles he could neither sue nor be sued in a court of law, at least where the contract is under seal, for it is a principle of the common law that no person can sue upon a contract under seal, even though it be made for his benefit, unless he be a party thereto.⁷³

⁷¹ Ante, § 380; 2 Min. Insts. 715; Webb v. Russell, 3 T. R. 402, 403; Stokes v. Russell, 3 T. R. 678, 1 H. Bl. 563; Roach v. Wadham, 6 East, 269.

⁷² Ante, § 375; 2 Min. Insts. 716; Bac. Abr. Covenant (E), 3; Spencer's Case, 5 Co. 156, 1 Smith Lead. Cas. 92, 96, et seq.

⁷³ 2 Min. Insts. 451; Ross v. Milne, 12 Leigh (Va.) 204, 218, et seq., 37 Am. Dec. 646; Tardy v. Creasy, 81 Va. 553, 59 Am. Rep. 676. See Sims, Cov. 196; Sugden, Vend. (14th Ed.) 581 et seq.; Mygatt v. Coe, 124 N. Y. 212, 26 N. E.

But a court of equity, either upon the theory that the covenant creates a trust for the benefit of subsequent purchasers or assignees, or upon the theory that it creates an easement, will often enforce by injunction restrictions upon the use of the land agreed upon by the original parties, even though the land shall have come into the hands of subsequent purchasers.⁷⁴

The most usual instance of the application of these principles is the case of a division of a tract of land into lots and the sale thereof to independent purchasers, who all take subject to the same covenants touching the use of the property; the covenants being for the benefit of all the purchasers. The court of equity, at the instance of one or more of such purchasers will enjoin the violation of the covenant by another of the purchasers.⁷⁵ And it seems to be immaterial whether the complainant has purchased his lot before or after the party who is guilty of violating the covenant.⁷⁶

§ 903. Same—Personal Covenants Running with the Land. Covenants which run with the land are those which affect the nature, quality, or value of the thing conveyed, where there is privity of estate between the contracting parties, as a covenant to pay rent, to repair, to be answerable for the title, etc. Covenants of this description pass with the land, and are binding on,

611, 11 L. R. A. 646; *Id.*, 147 N. Y. 456, 42 N. E. 17; *Hurd v. Curtis*, 19 Pick. (Mass.) 459; *Lyon v. Parker*, 45 Me. 474.

⁷⁴ *Ante*, § 475; 2 Min. Insts. 274; 2 Tiffany, Real Prop. § 348 et seq.; *Spicer v. Martin*, 14 App. Cas. 12; *Mander v. Falcke*, [1891] 2 Ch. 554; London, etc., R. Co. v. Gomm, 20 Ch. Div. 562; *Haywood v. Brunswick*, etc., Building Soc., 8 Q. B. Div. 403; *Vanmeter v. Vanmeter*, 3 Gr. (Va.) 148; *Crawford v. Patterson*, 11 Gr. (Va.) 364; *Pownal v. Taylor*, 10 Leigh (Va.) 172, 34 Am. Dec. 725; *Supervisors of Bedford County v. Bedford High School*, 92 Va. 295, 23 S. E. 299; *Ladd v. City of Boston*, 151 Mass. 585, 24 N. E. 858, 21 Am. St. Rep. 481; *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253; *Chase v. Walker*, 167 Mass. 293, 45 N. E. 916; *Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Muzzarelli v. Hulshizer*, 163 Pa. 643, 30 Atl. 291; *McMahon v. Williams*, 79 Ala. 288; *Clark v. McGee*, 159 Ill. 518, 42 N. E. 965; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Post v. Well*, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809.

⁷⁵ 2 Tiffany, Real Prop. §§ 351, 352, et seq.; *Spicer v. Martin*, 14 App. Cas. 12; *Collins v. Castle*, 36 Ch. Div. 243; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632; *Sharp v. Ropes*, 110 Mass. 381; *Hills v. Metzenroth*, 173 Mass. 423, 53 N. E. 890; *Clark v. Martin*, 49 Pa. 289; *McMahon v. Williams*, 79 Ala. 288; *Hayes v. Waverly & P. R. Co.*, 51 N. J. Eq. 345, 27 Atl. 648.

⁷⁶ 2 Tiffany, Real Prop. § 352; *Spicer v. Martin*, 14 App. Cas. 12; *Mackenzie v. Childers*, 43 Ch. Div. 265; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632; *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 24 Atl. 388; *Tallmadge v. East River Bank*, 26 N. Y. 105.

and in favor of, the assignee, although assigns be not expressly named; but it should be observed that the liability of the assignee is confined to the period of his occupancy, or at least of his interest in the land, whilst that of the lessee or grantee himself may continue indefinitely, being expressly undertaken.⁷⁷

Omitting from present consideration covenants contained in leases, and confining our attention to deeds conveying the fee-simple title, it may be well to observe that the courts are not at one with respect to the question whether the burdens, as well as the benefits, of covenants relating to the land, contained in a fee-simple conveyance, are to be regarded as running with the land.

So far as the benefits of such covenants are concerned, it seems to be generally conceded that they pass with the land, and that subsequent purchasers of the land may sue if the covenant be violated.⁷⁸

But the main question relates to the passing of the burdens of such covenants. In England it appears to be established that they do not run with the land, so as to make subsequent purchasers thereof bound to perform them, upon the very reasonable ground that thus perpetual restrictions upon the use of land might be imposed at the caprice of individuals, and the land thus come to future generations hampered and trammelled.⁷⁹ American authorities on this question are not in agreement.⁸⁰

⁷⁷ Ante, § 375; 2 Min. Insts. 716; Bac. Abr. Covenant (E), 3, 4; 2 Th. Co. Lit. 325, note (G, 3); Rawle, Cov. Tit. 281 et seq.; Spencer's Case, 5 Co. 15b, 1 Smith, Lead. Cas. 92, 96, et seq.; Congleton v. Pattison, 10 East, 130; Mayho v. Buckhurst, Cro. Jac. 438.

⁷⁸ 2 Tiffany, Real Prop. § 343; Sims, Cov. 136; Raby v. Reeves, 112 N. C. 688, 16 S. E. 760; Gaines v. Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; National Union Bank of Dover v. Segur, 39 N. J. Law, 173; St. Louis, I. M. & S. R. Co. v. O'Baugh, 49 Ark. 418, 5 S. W. 711; Peden v. Chicago, R. I. & P. R. Co., 73 Iowa, 328, 35 N. W. 424, 5 Am. St. Rep. 680.

⁷⁹ 2 Tiffany, Real Prop. § 344; Clark, Cont. 549; Brewster v. Kidgile, 12 Mod. 166; Brewster v. Kitchin, 1 Ld. Raym. 317; Austerberry v. Oldham, 29 Ch. Div. 750. In Keppell v. Bailey, 2 My. & K. 517, Lord Brougham says: "It must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy and caprice of any owner. * * * Great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote."

⁸⁰ Cases taking the English view are West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; Weld v. Nichols, 17 Pick. (Mass.) 538; Martin v. Drinan, 128 Mass. 515; Parish v. Whitney, 3 Gray (Mass.) 516; Kennedy v. Owen, 136 Mass. 199; Lincoln v. Burrage, 177 Mass. 378, 59 N. E. 67, 52 L. R. A. 110; Scott v. McMillan, 76 N. Y. 141; National Union Bank of Dover v. Segur, 39 N. J. Law, 184; Costigan v.

The most important by far of covenants in fee-simple conveyances, which run with the land, are those which relate to the title (generally designated "covenants of title"), and the subject will be developed especially with reference to them in the succeeding sections.

§ 904. **Same—Personal Covenants of Title—Implied Covenants of Title.** Upon the conveyance of a fee simple or other entire interest of the grantor (leaving no reversion in him), covenants of title are never implied, though they are sometimes implied in leases.⁸¹ In the former case, if the grantee has taken no express covenants of title, he is, in the absence of fraud or mutual mistake, without redress, if evicted under title paramount.⁸²

§ 905. **Same—Express Covenants of Title—Enumeration.** The covenants of title, usual in England in the case of conveyances of the fee simple, and therefore generally designated "English covenants of title," and which are gradually gaining ground in the United States, cover very thoroughly all the points that the experience of ages has taught are likely to arise to endanger the grantee's title to the land conveyed.

The English covenants are in substance as follows: (1) That the grantor is seised in fee simple of the land; (2) that the grantor has good right and lawful power to convey the land in fee simple; (3) that the grantee, his heirs and assigns, shall have quiet possession, and shall hold and enjoy the premises granted without eviction or disturbance; (4) that the land granted is free from incumbrances; and (5) that the grantor and his heirs shall execute all such further assurances of title to the land as shall be reasonably required by the grantee, his heirs or assigns.⁸³

Pennsylvania R. Co., 54 N. J. Law, 233, 23 Atl. 810; *Blount v. Harvey*, 51 N. C. 186; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175. Some of the cases taking the opposite view are *Gilmer v. Mobile & M. R. Co.*, 79 Ala. 569, 58 Am. Rep. 623; *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492; *Fitch v. Johnson*, 104 Ill. 111; *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410, 9 Am. St. Rep. 274; *Hickey v. Lake Shore & M. S. R. Co.*, 51 Ohio St. 40, 36 N. E. 672, 23 L. R. A. 396, 46 Am. St. Rep. 545; *Huston v. Cincinnati & Z. R. Co.*, 21 Ohio St. 236; *Dexter v. Beard*, 130 N. Y. 549, 29 N. E. 983; *St. Andrew's Lutheran Church's Appeal*, 67 Pa. 512; *Electric City Land & Improvement Co. v. West Ridge Coal Co.*, 187 Pa. 500, 41 Atl. 458; *Crawford v. Witherbee*, 77 Wis. 419, 46 N. W. 545, 9 L. R. A. 561.

⁸¹ Ante, § 368; 2 Min. Insts. 717.

⁸² 2 Min. Insts. 717; *Rawle, Cov. Tit.* 353 et seq.; *Williams v. Burrell*, 1 C. B. 429 et seq.; *Sutton v. Sutton*, 7 Grat. (Va.) 234, 56 Am. Dec. 109.

⁸³ 2 Min. Insts. 717, 718; 2 Th. Co. Lit. 325, note (G, 3); *Rawle, Cov. Tit.* 35 et seq., 101 et seq., 105 et seq., 145 et seq., 164 et seq.

In addition to, or rather, in perhaps the majority of cases, in the place of, these English covenants of title, there are also in use in this country the covenants of general and special warranty; the covenant of general warranty being practically equivalent to the third English covenant above enumerated, and the special warranty being even more restricted.⁸⁴

These various covenants of title we shall now examine in their order.

§ 906. Same—Covenant of Seisin. The first of the English covenants of title, namely, that the grantor is seised in fee simple of the land he purports to convey, is known as the covenant of seisin.

According to the better view, the term "seised," as used in this covenant, means such seisin (including constructive seisin)⁸⁵ as may now be had under the statutes of uses and wills, and applies only to seisin under a lawful claim of right, and not, as at common law, to the possession of a disseisor, who is at common law none the less seised, though his title be unlawful.⁸⁶ In accordance with this view, the covenant amounts to an undertaking or representation that the grantor has the estate, in quantity and quality, which he purports to convey.⁸⁷

But the covenant is not broken by the existence of liens and incumbrances on the land, or of rights of user therein, which do not amount to giving the seisin of the land to another, as in the case of inchoate dower, vendor's, mechanics' or judgment liens, etc.⁸⁸ It would be otherwise, however, as to dower consummate (at least, after assignment), or where others own an interest in common with the grantor.⁸⁹

⁸⁴ Post, § 911 et seq.

⁸⁵ Ante, §§ 131, 340.

⁸⁶ There are a few cases which take the latter view, and hold that the covenant of seisin is not broken if the grantor be actually in possession of the freehold, though his claim be unlawful, since he is, under the common-law interpretation of the term "seised." *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Marston v. Hobbs*, 2 Mass. 439, 3 Am. Dec. 61; *Wilson v. Widenham*, 51 Me. 566; *Backus v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585; *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004.

⁸⁷ 2 *Tiffany*, Real Prop. § 395; *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; *Woods v. North*, 6 Humph. (Tenn.) 309, 44 Am. Dec. 312; *Pringle v. Witten*, 1 Bay (S. C.) 256, 1 Am. Dec. 612; *Lockwood v. Sturdevant*, 6 Conn. 385; *Parker v. Brown*, 15 N. H. 186.

⁸⁸ *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272; *Moore v. Johnston*, 87 Ala. 220, 6 South. 50; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426.

⁸⁹ *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Downer v. Smith*, 38 Vt. 464.

The covenant of seisin is broken, if at all, as soon as it is made, but the damages therefor are not necessarily the consideration paid, but are to be measured by the actual loss sustained; so that if the covenantor, before any injury results, corrects the defect in the title, the recovery for the breach of the covenant will be limited to nominal damages only.⁹⁰

It may be observed in conclusion that since this covenant is broken, if at all, as soon as made, the grantor is not responsible under it to any assignee of the grantee, but only to the grantee himself; broken covenants not running with the land.⁹¹

§ 907. Same—Covenant of Right and Power to Convey in Fee Simple. The covenant of right and power to convey is for the most part equivalent to the covenant of seisin;⁹² but cases may arise wherein there may be a right or power to convey in fee simple, without any seisin in the grantor at all, as where the conveyance is made under a power of appointment. In such case, the covenant of seisin would not be appropriate.⁹³

§ 908. Same—Covenant for Quiet Enjoyment. This covenant is practically identical in effect with the covenant of general warranty, and its meaning and effect will be set forth in connection with the discussion of that covenant.⁹⁴

§ 909. Same—Covenant against Incumbrances. An incumbrance, as here used, is any right to or interest in the land, or the right to charge, subject, or use the same, subsisting in third persons, to the diminution of the value of the land, but consistent with a transfer of the fee simple to the grantee.⁹⁵ Thus any lien, whether it be a mortgage, a judgment or attachment lien, a lien for taxes, a vendor's or mechanics' lien, etc., is embraced by the covenant.⁹⁶

⁹⁰ *Building, Light & Water Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

⁹¹ *Ante*, § 903.

⁹² *Building, Light & Water Co. v. Fray*, 96 Va. 559, 32 S. E. 58; *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91; *Baldwin v. Timmins*, 3 Gray (Mass.) 302.

⁹³ 2 *Tiffany*, *Real Prop.* § 396. See *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442; *Slater v. Rawson*, 6 Metc. (Mass.) 439.

⁹⁴ *Post*, § 912 et seq.

⁹⁵ 2 *Tiffany*, *Real Prop.* § 397; *Prescott v. Trueman*, 4 Mass. 630, 3 Am. Dec. 246; *Huyck v. Andrews*, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432; *Lafferty v. Milligan*, 165 Pa. 534, 30 Atl. 1030; *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638.

⁹⁶ 2 *Tiffany*, *Real Prop.* § 397; *Wyman v. Ballard*, 12 Mass. 304; *Jenkins v. Hopkins*, 8 Pick. (Mass.) 346; *Norton v. Babcock*, 2 Metc. (Mass.) 510; *Cockran v. Guild*, 106 Mass. 29, 8 Am. Rep. 296; *Hall v. Dean*, 13 Johns. (N. Y.) 105; *Funk v. Voneida*, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617; *Thomas v. St. Paul's M. E. Church*, 86 Ala. 138, 5 South. 508; *Plowman v. Williams*, 6 Lea (Tenn.) 268; *Crowell v. Packard*, 35 Ark. 348.

The covenant also affords protection to the purchaser against private easements, such as a right of way, or a right to maintain a drain, etc., of which he has no notice, but not against a public highway.⁹⁷ But an easement created by the conveyance of a quasi servient tenement is not within the protection of the covenant, nor is the creation of such an easement affected by the fact that the conveyance of such quasi servient estate contains a covenant against incumbrances.⁹⁸

So, also, a natural easement, such as the right of support of land by adjacent or subjacent land, or the right to the uninterrupted flow of a stream, is not within the scope of the covenant, and is not to be regarded as an incumbrance.⁹⁹

But the existence of a right of dower, whether inchoate or consummate, is a violation of the covenant against incumbrances—at least, if the dower be not already assigned.¹ In the latter case it would seem to be rather a violation of the covenant of seisin or of right and power to convey.²

Whether the incumbrance is one not intended by the parties to be included within the covenant is a question of intention, to be established by reference to the conveyance as a whole, its subject-matter, the relation of the parties to it and to each other, and the knowledge of the existence of the incumbrance on the part of the grantee.³ Thus, if the grantee assumes the payment of a mortgage on the land, the existence of such mortgage is not a breach of the covenant against incumbrances, though not expressly excepted.⁴

But the fact that the grantee has notice of the incumbrance, while important as an evidence that the incumbrance was not in-

⁹⁷ 2 Min. Insts. 721; 2 Tiffany, Real Prop. § 397; *Jordan v. Eve*, 31 Grat. (Va.) 1; *Deacon v. Doyle*, 75 Va. 261; *Blake v. Everett*, 1 Allen (Mass.) 248; *Prescott v. White*, 21 Pick. (Mass.) 341, 32 Am. Dec. 266; *Wilson v. Cochran*, 46 Pa. 333; *Scriven v. Smith*, 100 N. Y. 471, 3 N. E. 675, 53 Am. Rep. 224.

⁹⁸ 2 Tiffany, Real Prop. § 397; *Harwood v. Benton*, 32 Vt. 724; *Dunklee v. Wilton R. Co.*, 24 N. H. 489.

⁹⁹ 2 Tiffany, Real Prop. § 397; *Prescott v. Williams*, 5 Metc. (Mass.) 429, 39 Am. Dec. 688.

¹ *Ficklin v. Rixey*, 89 Va. 832, 17 S. E. 325, 37 Am. St. Rep. 891; *Porter v. Noyes*, 2 Me. 22, 11 Am. Dec. 30; *Bigelow v. Hubbard*, 97 Mass. 195; *Barnett v. Gaines*, 8 Ala. 373; *Walker v. Deaver*, 79 Mo. 664; *Carter v. Denman*, 23 N. J. Law, 260.

² Ante, § 906; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Downer v. Smith*, 38 Vt. 464.

³ 2 Tiffany, Real Prop. § 397; *Rawle, Cov. Tit.* § 85; *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542; *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85; *Barre v. Fleming*, 29 W. Va. 314, 1 S. E. 731.

⁴ *Freeman v. Foster*, 55 Me. 508; *Watts v. Welman*, 2 N. H. 458.

tended to be within the scope of the covenant, is by no means conclusive upon that point, for it might well be that the grantee expected the grantor to clear it off before executing the deed, or out of the purchase money.⁵

§ 910. Same—Covenant for Further Assurance of Title. Under this covenant the grantee may only demand that his grantor do such further acts as may be reasonably necessary to perfect the title. He cannot demand nor expect that the grantor should do acts which are unnecessary, or impossible of performance; nor can he reject acts that constitute all that is reasonably necessary, merely because they are not satisfactory to him.⁶

Unlike the other covenants heretofore considered, which, for the most part, sound in damages, the remedy for the breach of this covenant is more often a suit for specific performance, which constitutes it a valuable covenant for the grantee.⁷

§ 911. Same—Covenant of Special Warranty. This covenant only protects the grantee against the claims or demands of the grantor or of those claiming by, through or under him.

Indeed, it is, for the most part, confined to deeds executed by persons in a fiduciary capacity, who are not making the conveyance for their own benefit, such as trustees, commissioners of the court, etc., though occasionally a deed is found, containing such a covenant, executed by the owner of the land himself to an ill-advised grantee.⁸

§ 912. Same—Covenant of General Warranty. This covenant protects the grantee against the lawful claims of all persons whomsoever.

The general warranty is, in fact and in essence, substantially the same as a covenant for quiet enjoyment, and it is believed that no action lies upon it until eviction, or at least disturbance of the possession.⁹ It is immaterial whether this eviction is the act of the

⁵ Rawle, Cov. Title, § 88; Funk v. Voneida, 11 Serg. & R. (Pa.) 112, 14 Am. Dec. 617; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Grice v. Scarborough, 2 Speers (S. C.) 649, 42 Am. Dec. 391.

⁶ 2 Tiffany, Real Prop. § 399; Rawle, Cov. § 99 et seq.; Gish v. Moomaw, 89 Va. 376, 17 S. E. 324.

⁷ 2 Tiffany, Real Prop. § 399; Rawle, Cov. § 99 et seq.; Colby v. Osgood, 29 Barb. (N. Y.) 339.

⁸ 2 Min. Insts. 718.

⁹ 2 Min. Insts. 719; Rawle, Cov. 210, 211, et seq.; Morgan v. Haley, 107 Va. 334, 58 S. E. 564, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846; Emerson v. Proprietors of Land, 1 Mass. 464, 2 Am. Dec. 34; Kramer v. Carter, 136

grantor, or of a third person claiming under paramount title.¹⁰ Such eviction, however, need not be actual, but may sometimes be constructive, as where the covenantee is compelled under decree of court to purchase the adverse claim or to surrender the possession.¹¹

But it is not broken by a tortious disturbance, or even by an eviction, by a mere stranger under no claim of title, since that is beyond the grantor's control, and the grantee has a legal remedy against the trespasser or disseisor.¹² A fortiori, a mere trespass, there being no eviction, either actual or constructive, is not a breach of the covenant, whether the trespasser be the grantor or a third person.¹³

The covenant is broken if, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, without any other act on the part of either the grantee or the claimant; such failure to get possession being regarded as tantamount to an eviction.¹⁴

And it will be observed that such a covenant as this can never be treated as a covenant against incumbrances, for that would be a departure from its terms, and would make it unavailable by an assignee of the grantee; for as to any prior incumbrance it would be broken at the instant of the execution of the grantor's deed, and, having thus become a mere right of action, would not pass by the grantee's assignment.¹⁵

Mass. 504; *Copeland v. McAdory*, 100 Ala. 553, 13 South. 545; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385.

¹⁰ 2 Tiffany, Real Prop. § 398; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *McGrew v. Harmon*, 164 Pa. 115, 30 Atl. 265, 268; *Akerly v. Vilas*, 23 Wis. 207, 99 Am. Dec. 165; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Burrus v. Wilkinson*, 31 Miss. 537.

¹¹ *Morgan v. Haley*, 107 Va. 334, 335, 58 S. E. 564, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456.

¹² 2 Tiffany, Real Prop. § 398; *Noonan v. Lee*, 2 Black, 499, 17 L. Ed. 278; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330, 38 Am. Dec. 637; *Chestnut v. Tyson*, 105 Ala. 149, 16 South. 723, 53 Am. St. Rep. 101; *Hoppes v. Cheek*, 21 Ark. 585.

¹³ 2 Tiffany, Real Prop. § 398; *Crosse v. Young*, 2 Show. 425; *Claunch v. Allen*, 12 Ala. 159; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680. For the distinction between actual and constructive eviction, with illustrations, see ante, § 373.

¹⁴ 2 Min. Insts. 718; *Rawle, Cov. 220 et seq.*; *Day v. Chism*, 10 Wheat. 449, 6 L. Ed. 363; *Morgan v. Haley*, 107 Va. 334, 58 S. E. 564, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846; *Banks v. Whitehead*, 7 Ala. 83; *Moore v. Vail*, 17 Ill. 190; *Grist v. Hodges*, 14 N. C. 200; *Clark v. Conroe's Estate*, 38 Vt. 469.

¹⁵ 2 Min. Insts. 719; *Grist v. Hodges*, 14 N. C. 200; 3 Washburn, Real Prop. (6th Ed.) § 2389.

§ 913. **Same — Liability of Remote Grantors upon Personal Covenants of Title.** There are certain of the covenants of title that are broken as soon as made, if broken at all; and these do not run with the land, since broken covenants cease immediately upon breach to pass with the land.¹⁶ Such are the covenants of seisin, and of the right to convey,¹⁷ and, it seems, the covenant against incumbrances also.¹⁸

But, except in these cases, covenants of title run with the land, so that a remote assignee of the land may sue thereon when a breach occurs in his time; and this right is not affected by the fact that his immediate grantor has also given him covenants of title which are violated by the same eviction. He may sue either.¹⁹ But no owner of the land, after parting therewith, may sue a prior grantor, until he has himself been compelled to pay damages on his own covenant, in favor of one claiming under him, this being regarded as equivalent to an eviction. But for this rule, several judgments might be recovered against a remote grantor for the same breach by successive owners of the land.²⁰ And where one covenantor is thus sued upon his covenant by the party evicted and judgment recovered against him, in order that he may sue a prior covenantor for reimbursement, the burden is ordinarily upon him to prove in his action that the evictor had a valid title. But he may relieve himself of this burden, if, in the prior suit wherein judgment has been recovered against him, he should have notified the

¹⁶ Ante, §§ 906, 907.

¹⁷ Ante, § 906; *Building, Light & Water Co. v. Fray*, 96 Va. 559, 32 S. E. 58; *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646; *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; *Mitchell v. Warner*, 5 Conn. 498; *Chapman v. Holmes*, 10 N. J. Law, 20; *Clement v. Bank of Rutland*, 61 Vt. 298, 17 Atl. 717, 4 L. R. A. 425; *Lawrence v. Montgomery*, 37 Cal. 188; *Ballard v. Child*, 34 Me. 355.

¹⁸ 2 Min. Insts. 719; 2 Tiffany, Real Prop. § 401; *Washington City Sav. Bank v. Thornton*, 83 Va. 164, 2 S. E. 193; *Clark v. Swift*, 3 Metc. (Mass.) 390; *Mitchell v. Warner*, 5 Conn. 498; *Carter v. Denman*, 23 N. J. Law, 260; *Lawrence v. Montgomery*, 37 Cal. 183; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Blondeau v. Sheridan*, 81 Mo. 545. See ante, § 907.

¹⁹ 2 Tiffany, Real Prop. § 401; *Morgan v. Haley*, 107 Va. 331, 58 S. E. 564, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846; *Rawle, Cov. § 216*; *Markland v. Crump*, 18 N. C. 101, 27 Am. Dec. 230; *Withy v. Mumford*, 5 Cow. (N. Y.) 137.

²⁰ 2 Tiffany, Real Prop. § 401; *Rawle, Cov. § 216*; *Wheeler v. Sohler*, 3 Cush. (Mass.) 222; *Withy v. Mumford*, 5 Cow. (N. Y.) 137; *Markland v. Crump*, 18 N. C. 94, 27 Am. Dec. 230; *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233; *Redwine v. Brown*, 10 Ga. 311; *Chase v. Weston*, 12 N. H. 413; *Clement v. Bank of Rutland*, 61 Vt. 298, 17 Atl. 717, 4 L. R. A. 425.

more remote covenantor of the pendency of such prior action and requested him to defend it.²¹

Neither the covenantee nor any subsequent owner of the land can in general, after having parted with the land, release the covenant, so as to deprive a subsequent owner of the land of his right to sue thereon; and, indeed, it is very questionable whether he can do so while he still holds the land, so far as concerns a subsequent purchaser without notice of such release.²²

§ 914. Same—Extent or Measure of Recovery upon Personal Covenants of Title. Because of the danger imposing a grievous burden upon the grantor, in case he should unwittingly convey a defective title, the courts of England, of most of the states, and of the United States have persistently declined to measure the damages, upon a breach of covenant of title, by the value of the land lost as at the time of eviction, but have held that the proper measure of recovery is the value of the land at the time of the warranty, that is, at the time of the conveyance; and the best standard of such value is in general the price agreed upon at the time of the sale or so much thereof as has been paid (with interest from the date of the eviction and the legal and taxable costs expended in the action in which eviction occurs).²³

It should be noted in this connection that, if the grantee recovers judgment upon a breach of the covenant of seisin (and probably upon a covenant of power to convey also), the effect is to establish judicially that the grantor is not seised of the land conveyed (or has not the power to convey the same), the logical and legal conclusion from which seems to be that the grantor's deed to the grantee (wherein the covenant occurs) must be deemed to be void.²⁴

In case of a breach of the covenant against incumbrances, the amount the grantee has been compelled to pay in order to satisfy the outstanding incumbrance, or the loss he has actually sustained by reason of the enforcement thereof, constitutes the measure of the recovery, provided it does not exceed the total amount of the consideration or purchase price for the land actually paid by him.²⁵

²¹ Rawle, Cov. § 117; *Andrews v. Gillespie*, 47 N. Y. 487.

²² 2 *Tiffany*, Real Prop. § 401; *Abby v. Goodrich*, 3 Day (Conn.) 433; *Claycomb v. Munger*, 51 Ill. 373; *Crooker v. Jewell*, 29 Me. 527; *Chase v. Weston*, 12 N. H. 413; *Field v. Snell*, 4 Cush. (Mass.) 504; *Susquehanna & W. V. R. & Coal Co. v. Quick*, 61 Pa. 339. But see *Littlefield v. Getchell*, 32 Me. 392.

²³ *Hale*, Dam. § 158. The states which have adopted the value of the land at the time of eviction as the measure of damages are Connecticut, Maine, Massachusetts, South Carolina and Vermont. See 3 *Washburn*, Real Prop. (6th Ed.) § 2414.

²⁴ *Stinson v. Sumner*, 9 Mass. 143, 6 Am. Dec. 49.

²⁵ *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 142; *Foote v. Burnet*, 10 Ohio,

§ 915. **Same—Effect of Personal Covenants of Title in Estopping Grantor to Set Up After-Acquired Title.** When land is conveyed without any covenants of title, the grantor is, in general, not estopped to set up a title which he has afterwards acquired.

On the other hand, a covenant of title does work an estoppel in such case, partly in order to avoid circuity of action, seeing that, if the grantor were allowed to recover upon the after-acquired title, he would be immediately liable to the grantee upon his covenant of title to the extent of the value of the land; but also for another still more urgent reason, namely, that honesty and fair dealing forbid that one shall assert a right in opposition to his own averments and representations. Hence a grantor is estopped to set up a title which he has afterwards acquired, not only where there is a covenant of general warranty, but in any case where the deed of conveyance recites or affirms, expressly or impliedly, that the grantor is seised of the estate which the deed purports to convey, and upon the faith of which the bargain was made.²⁶

§ 916. **IX. Conclusion of the Deed.** This part of a deed in general includes an affirmation that the signatures and seals attached thereto are those of the parties stipulating, in some such form as the following: "Witness the signatures and seals of the parties."²⁷

This part of the deed also comprehends the date, which is not essential; so that though there be no date, or a false or impossible date, the deed is yet valid. The true date is the time when the deed is proved to have been delivered (being, indeed, only the rendering of the Latin phrase, *datum et deliberatum*), but *prima facie* it is the time named as the date. The time of acknowledgment, or other authentication for registry, sometimes determines, or at least assists in determining, the true date.²⁸

§ 917. **X. Reading the Deed.** It is necessary to the validity of a deed, as of any other instrument, that the party executing the same should know, or should have a fair opportunity to know, its contents. The essential thing is to acquaint the grantor in the deed

317, 36 Am. Dec. 90; *Guthrie v. Russell*, 46 Iowa, 269, 26 Am. Rep. 135; *Collier v. Cowger*, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107. See *Hale, Dam.* § 159.

²⁶ Post, § 1066; 2 Min. Insts. 710; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 703; *Flanary v. Kane*, 102 Va. 566, 46 S. E. 312; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Hagensick v. Castor*, 53 Neb. 495, 73 N. W. 932.

²⁷ See post, § 1052.

²⁸ 2 Min. Insts. 726, 727; 2 Bl. Com. 304; *Bac. Abr. Lease (I)*, 1. See post, § 1058.

with its contents, and it is immaterial whether that be done by his reading the instrument for himself, or by its being read to him. In the latter case it must, of course, be truly read; and if misread as to any part, it is, as to so much at least, and doubtless as to all dependent thereon, merely void. But if correctly read, the fact that it was misunderstood does not affect the validity of the instrument.²⁹

§ 918. **XI. Sealing and Signing the Deed—1. Origin of the Seal.** The use of seals as marks of authenticity to letters and other writings is extremely ancient. We read of it among the Jews and Persians in the earliest records of history. And in the book of Jeremiah there is a remarkable instance, not only of an attestation by seal, but also of the other formalities usually attending a Jewish purchase.³⁰ In the civil or Roman law, also, seals were the evidence of truth.³¹

But in the times of the Saxons they were not much used in England. The Saxon method was, for such as could write, to subscribe their names, and, whether they could write or not, to affix the sign of the cross, a custom which illiterate persons observe to this day, by signing a cross for their mark when unable to write their names; and this inability to write, and therefore making a cross in its stead, is honestly avowed by one of the Saxon kings at the end of his charters—*propria manu, pro ignorantia literarum, signum sanctæ crucis expressi et subscripsi*. In like manner, and for the same insurmountable reason, the Normans, a brave but unlettered nation, upon their first settlement in France, used the practice of sealing only, without writing their names, which custom continued when learning made its way among them, though the reason had ceased, and was by them, upon the Conquest, introduced into England instead of the English method of parties writing their names and signing with the sign of the cross. And in the reign of Edward I every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct, particular seals.³²

§ 919. **Same—2. Deed to be Signed as Well as Sealed.** Sealing alone (without signing) was sufficient in England to authenticate

²⁹ 2 Min. Insts. 727; 2 Bl. Com. 304; *Thoroughgood's Case*, 2 Co. 9; *School Committee v. Kesler*, 67 N. C. 443.

³⁰ 2 Min. Insts. 727; 1 Kings, ch. xxi; Daniel, ch. vi; Esther, ch. viii; Jer. ch. xxxii.

³¹ 2 Min. Insts. 727.

³² 2 Min. Insts. 727, 728; 2 Bl. Com. 305, 306; 2 Th. Co. Lit. 233.

a deed, until the statute 29 Car. II, c. 3, expressly directed signing in grants of land and some other kinds of deeds.

As a general thing in this country, the statutes require deeds to be signed. But down to within a recent date there were a few states in which the statutory requirement went no further than the "sealing and delivery" in the presence of witnesses.³³

§ 920. Same—3. Nature of the Seal—Common-Law Doctrine.

By the original common law a seal was universally defined, until recently, to be an impression on wax, or some other tenacious material. But of late imposing authorities make it at least possible that hereafter, by an act of court-made law, it will be held (contrary to the notorious fact) that, by the common law, a seal is an impression on any substance capable of receiving and retaining an impression, and, therefore, as well on the paper or parchment itself, as on wax or wafer.³⁴

It was held at common law that the impression need not be acknowledged as a seal in the body of the instrument, and that whether a writing is sealed or not is to be proved by the fact when it is produced, while the question whether the impression appearing on the wax is the seal of the party is to be proved like any other fact, and, furthermore, that several parties may seal with one seal, or acknowledge one impression as the seal of all.³⁵

A statement in the instrument that it is sealed does not suffice as a substitute for a seal.³⁶

§ 921. Same—Statutory Requirements as to Sealing in the United States. As a general thing in this country natural persons are permitted to substitute a "scroll" for the common-law seal, and

³³ Wms. Real Prop. 126; *Sicard v. Davis*, 6 Pet. 124, 8 L. Ed. 342; *Plummer v. Russell*, 2 Bibb (Ky.) 174.

³⁴ 2 Min. Insts. 661, 728; 1 Min. Insts. 593; 1 Sugden, Powers, 282, 283. c. vi, § iv, 9; Bac. Abr. Obligation (C); Reg. v. St. Paul's, 7 Q. B. 238, 239; *Pillow v. Roberts*, 13 How. 473, 474, 14 L. Ed. 228; *Curtis v. Leavitt*, 15 N. Y. 9; *Bates v. Boston & N. Y. C. R. Co.*, 10 Allen (Mass.) 251; *Haven v. Grand Junction R. & Depot Co.*, 12 Allen (Mass.) 337.

³⁵ 2 Min. Insts. 728, 729; Bac. Abr. Obligation (C); Com. Dig. Faits (A. 2); *Goddard's Case*, 2 Co. 5a; 1 Dyer, 19a; *Ld. Lovelace's Case*, W. Jones, 268; *Ball v. Dunsterville*, 4 T. R. 313; *Cooch v. Goodman*, 2 Ad. & El. 598; *Ball v. Taylor*, 1 Car. & P. 417; *Warren v. Lynch*, 5 Johns. (N. Y.) 244; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Proprietors of Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417, 428; *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205; *Wing v. Chase*, 35 Me. 260; *Taylor v. Glaser*, 2 Serg. & R. (Pa.) 502; *Carter v. Doe ex dem. Chaudron*, 21 Ala. 88.

³⁶ *Taylor v. Glaser*, 2 Serg. & R. (Pa.) 502; *McPherson v. Reese*, 58 Miss. 749; *Deming v. Bullitt*, 1 Blackf. (Ind.) 241; *Davis v. Judd*, 6 Wis. 85.

in some states the distinction between sealed and unsealed instruments has been entirely abolished.³⁷

§ 922. **XII. Delivery of the Deed.** The next requisite of a valid deed is that it be delivered to the party himself or his agent. A deed takes effect only from this delivery; for, if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party deliver it himself, he thereby adopts the sealing, and by parity of reason the signing also, and makes them both his own.³⁸

The deed of a corporation needs no delivery, the affixing of the common seal giving perfection to it without any further ceremony, at least if it be done with that intent; for if the order to affix the seal be accompanied by a direction to the officer to retain the conveyance in his hands until certain conditions be complied with, the sealing does not amount to delivery.³⁹

§ 923. **Same—Mode of Making Delivery.** The usual mode of making delivery of a deed is to take it up and say, "I deliver this as my act and deed." But it may be without words, or by mere words, without any act of delivery; as if the writing, sealed, be handed to the grantee, or whilst it lies upon the table, the feoffor says to the feoffee, "Take the writing; it is sufficient for you," or, "Take it as my deed," or the like. Nor, indeed, is a formal delivery essential, if there be acts evidencing an intention to deliver. It is not even essential that the grantee should be present at the time, or the delivery be personally made to and accepted by him. And although there must be an acceptance of the deed (which is usually implied in the delivery), and presumed from the beneficial character of the transaction, supposing it be for the grantee's benefit, there is no necessity that the acceptance should take place immediately upon the delivery.⁴⁰

The deed need not be delivered to the grantee in person in order to be effectual. If delivered to a third person unconditionally, and without reserving the right to recall it or otherwise to control its

³⁷ 2 Reeves, Real Prop. §§ 1106, 1107.

³⁸ 2 Min. Insts. 731; 2 Bl. Com. 307.

³⁹ 2 Min. Insts. 731; Angell & Ames, Corp. § 227.

⁴⁰ 2 Min. Insts. 731; 2 Bl. Com. 306, note (17); Sheppard's Touchst. 57 et seq.; 4 Kent, Com. 454 et seq.; 2 Th. Co. Lit. 234, 235; Frank v. Frank, 100 Va. 627, 42 S. E. 666; Church v. Gilman, 15 Wend. (N. Y.) 656, 30 Am. Dec. 82, 89, note; Jones v. Jones, 6 Conn. 111, 16 Am. Dec. 39, note. See Brown v. Westerfield, 47 Neb. 399, 66 N. W. 439, 53 Am. St. Rep. 537, note. The recording of a deed is not delivery, but it affords prima facie evidence of delivery. Davis v. Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7; Ellis v. Clark, 39 Fla. 714, 23 South. 410.

use, with direction to deliver to the grantee after the grantor's death, or upon any certain future event, the delivery is effectual to pass title to the grantee, and the grantor cannot recall it.⁴¹

But whilst a deed may be delivered, not only to the grantee himself, but to any stranger for his use, or declared to be delivered although the grantee be absent, yet if delivered to a stranger, or even to the grantee himself, without any declaration or other matter to show that it is for the use of the grantee, it is not a sufficient delivery.⁴² On the other hand, since delivery is a matter of intention, not of physical or manual transfer, it would seem that a declaration to a third person of an intention that the deed shall take effect would be quite as effective as a manual transfer to him, if it can be satisfactorily established.⁴³

And whilst it is not indispensable that the grantee's acceptance should ensue immediately, and his subsequent assent relates back to the delivery, yet if there be no subsequent acceptance, or none before some other party acquires, for valuable consideration, by conveyance of the grantor or otherwise, a right to the property or to charge it, the deed is ineffectual.⁴⁴

§ 924. **Same—Proof of Delivery.** The delivery of the deed, like any other fact, may as well be inferred from circumstances as proved by positive testimony. Thus, although the subscribing witnesses remember nothing of the delivery, nor even of the transaction itself, yet if they recognize their signatures to the attestation, and especially if they declare that they know what is necessary for the valid execution of such an instrument, and would not have attested it, had they not supposed everything was regularly

⁴¹ *Frank v. Frank*, 100 Va. 627, 42 S. E. 666; *Trask v. Trask*, 90 Iowa, 318, 57 N. W. 841, 48 Am. St. Rep. 446; *White v. Pollock*, 117 Mo. 467, 22 S. W. 1077, 38 Am. St. Rep. 671; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; *Wheelwright v. Wheelwright*, 2 Mass. 454, 3 Am. Dec. 66; *Brown v. Westerfield*, 47 Neb. 399, 66 N. W. 439, 53 Am. St. Rep. 539, note.

⁴² 2 Min. Insts. 732; *Sheppard's Touchst.* 57; *Mitchell v. Ryan*, 3 Ohio St. 377; *Jackson v. Phipps*, 12 Johns. (N. Y.) 418; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315; *Braman v. Bingham*, 26 N. Y. 483; *Bovee v. Hinde*, 135 Ill. 137, 25 N. E. 694; *Dwinell v. Bliss*, 58 Vt. 353, 5 Atl. 317.

⁴³ 2 Tiffany, Real Prop. § 406; *Regan v. Howe*, 121 Mass. 424; *Moore v. Hazelton*, 9 Allen (Mass.) 102; *Vought v. Vought*, 50 N. J. Eq. 177, 27 Atl. 489; *Kane v. Mackin*, 9 Smedes & M. (Miss.) 387; *Rushin v. Shields*, 11 Ga. 636, 56 Am. Dec. 436; *Diehl v. Emig*, 65 Pa. 320; *Linton v. Brown* (C. C.) 20 Fed. 455.

⁴⁴ 2 Min. Insts. 732; *Skipwith v. Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 642; *Walwyn v. Coutts*, 3 Meriv. 707, 3 Sim. 14; *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Acton v. Woodgate*, 2 My. & K. 97; *Brown v. Westerfield*, 47 Neb. 399, 66 N. W. 439, 53 Am. St. Rep. 544, note.

done as required by law, it justifies the conclusion, in the absence of any contrary testimony, that the delivery took place.⁴⁵

So, also, it seems that the signing, sealing and acknowledgment of a conveyance raises a presumption of delivery.⁴⁶

§ 925. **Same—Conditional Delivery or Delivery in Escrow.** The delivery of a conveyance may be either absolute or conditional. Of absolute delivery nothing particular needs to be said, for every delivery is presumed to be absolute, unless it appears to be conditional.

It is of the essence of a conditional delivery (or escrow) of a sealed instrument, perfect on its face, that it should be made, not to the grantee himself, nor to his known agent (for then it must perforce be absolute for the most part, and any condition annexed will be void), but made to a stranger, to be delivered by him, as the deed of the grantor, when certain conditions are complied with. It is then styled an escrow, in respect to which Mr. Preston enumerates the following principles:

(1) The writing does not operate as a deed till the second delivery.

(2) The deed is of none effect until the conditions be performed, although the grantee obtain possession of it, or even though the person deputed to make the second delivery wrongfully turn it over to him.

(3) On the second delivery rightfully made, it takes effect by relation, in respect of title and right to the intermediate rents, from the original delivery.

(4) Supposing the conditions performed, and the deed delivered the second time, its effect is not impaired by the death of either or both of the parties, or by a supervening disability in the grantor, such as coverture of a feme, before the second delivery.⁴⁷

As the escrow takes effect from the original delivery, if the grantor were then under disability, as of infancy, from which he is relieved before the second delivery, yet the deed operates nothing; but if at the first period there be a mere impediment connected

⁴⁵ 2 Min. Insts. 732; *Currie v. Donald*, 2 Wash. (Va.) 58. See *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. 1041, 33 Am. St. Rep. 326, note; *Cazassa v. Cazassa*, 92 Tenn. 573, 22 S. W. 560, 20 L. R. A. 178, 36 Am. St. Rep. 112.

⁴⁶ 2 Min. Insts. 733; *Hutchison v. Rust*, 2 Grat. (Va.) 394; *Kille v. Ege*, 79 Pa. 15; *Diehl v. Emig*, 65 Pa. 320; *Brann v. Monroe*, 11 Ky. Law Rep. 324. But see *Boyd v. Slayback*, 63 Cal. 493; *Alexander v. De Kermel*, 81 Ky. 345.

⁴⁷ 2 Min. Insts. 734, 735; 3 Preston, Abst. Tit. 73 et seq.; *Sheppard's Touchst.* 59; *Butler & Baker's Case*, 3 Co. 35b; *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262.

with the situation of the property, and having no concern with his personal capacity to contract, and the impediment is removed prior to the second delivery, the deed is good. Thus, where a disseisee, being out of possession, makes at common law a lease for years, and delivers it to a stranger as an escrow, bidding him enter on the land, and there to deliver the writing to the lessee, as his deed, it is a good lease.⁴⁸

And whatever form of words be employed, care must be taken that the language shall signify that the instrument is delivered as the grantor's writing of escrow, and not as his deed; for in the latter case, although it is to be delivered to the grantee only on some future event, yet it is the grantor's deed immediately, and the third person is a trustee of it for the grantee, so that, if the grantee obtain the writing from the trustee before the event happens, it will avail him fully, at least in a court of law, and the grantor is put to his remedy against the trustee.⁴⁹

§ 926. XIII. Attestation of Deed by Witnesses or Acknowledgment Thereof by Grantor. The attestation of the deed by witnesses is not at common law essential to the validity of the deed, but only a proper and convenient method of establishing its genuineness and authenticity.⁵⁰

In this country, the local statute must be consulted in order to determine (1) whether attestation is required, and if so, (2) how many witnesses are required, and (3) in certain states, the result of a lack of attestation. There are states in which attestation is necessary in order to give a deed validity between the parties, and others in which a deed may be valid as between the parties without attestation, but invalid as against subsequent purchasers even with notice.⁵¹

A witness need not actually see the deed executed. If the grantor acknowledge it to him, that is sufficient.⁵²

The acknowledgment of the grantor before certain functionaries designated by the statutes on the subject is not a part of the deed and does not generally affect its validity as between the parties, but is necessary to entitle the deed to record, unless it be proved

⁴⁸ 2 Min. Insts. 735; Sheppard's Touchst. 59; Butler's & Baker's Case, 3 Co. 35b.

⁴⁹ 2 Min. Insts. 735, 736.

⁵⁰ 2 Min. Insts. 736; 2 Bl. Com. 307, note (18).

⁵¹ 2 Reeves, Real Prop. § 1114.

⁵² 2 Min. Insts. 736; Parks v. Mears, 2 Bos. & P. 217; Jones v. Robbins, 71 Tex. 615, 12 S. W. 824.

for record in some other alternative method provided by statute, e. g., by the oath of one of the witnesses.⁵³

§ 927. **XIV. Registry of the Deed.** The statutes of the different states vary as to the necessity for recording. As a general proposition it is not necessary in order to give effect to the deed as between the parties. At least one state requires it.⁵⁴ In other states only certain classes of deeds, e. g., deeds of married women and tax deeds, are required to be recorded.

But the record of a deed is necessary in order to protect the grantee against lien creditors of, and subsequent purchasers from, the grantor without notice.

§ 928. **Description of Property Conveyed—In General.** It is obvious that, in order to pass any property, the deed or other instrument transferring the same must describe the property intended to be conveyed with sufficient accuracy to identify it. Otherwise, the conveyance is void for vagueness and indefiniteness.⁵⁵ And if the description be so vague and uncertain as not to be self-explanatory, the burden rests upon those claiming under it to show by evidence aliunde to what it truly applies;⁵⁶ and, in the absence of such evidence, that rule of construction is adopted which declares that ambiguous or doubtful language in a deed is to be construed most strongly against the grantor, and that the grantee shall have the benefit of such doubt or ambiguity, provided such construction does not work an injury to the rights of third persons.⁵⁷

While a deed is always void if the description of the property conveyed be too vague and indefinite, it is not necessarily void if the description be false, paradoxical as this may seem. For it is a well-established rule for the construction of such instruments that if, after rejecting so much of the description as is false, enough

⁵³ 2 Reeves, Real Prop. § 1115. But a few of the states require the acknowledgment to give the deed validity, even as between the parties.

⁵⁴ Maryland, Code Pub. Gen. Laws, art. 21.

⁵⁵ *George v. Bates*, 90 Va. 839, 20 S. E. 828; *United States v. King*, 3 How. 787, 11 L. Ed. 824; *Kea v. Robeson*, 40 N. C. 373; *Dickens v. Barnes*, 79 N. C. 490; *Westfall v. Cottrills*, 24 W. Va. 763; *Clark v. Chamberlin*, 112 Mass. 19; *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 381; *Wilson v. Inloes*, 6 Gill (Md.) 121; *Holme v. Strautman*, 35 Mo. 293; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769.

⁵⁶ Latent, but not patent, ambiguities may be explained by parol evidence, and facts existing at the time of the conveyance and prior thereto may be proved by parol evidence, with a view of establishing a particular line as being the one contemplated by the parties, when, by the terms of the deed, such line is left uncertain.

⁵⁷ But this rule is only applied as a last resort. *Clough v. Bowman*, 15 N. H. 504; *Dodge v. Walley*, 22 Cal. 228, 83 Am. Dec. 61.

remains to identify the thing described, the instrument is operative, the legal maxim being, "*Falsa demonstratio non nocet, cum de corpore constat.*"⁵⁸

There are various methods of describing land in deeds of conveyance, and frequently the parties, not content with one form of description, seek to make the assurance doubly sure by resorting to several. In such cases great caution should be observed to see that the different descriptions are not inconsistent with, or repugnant to, one another. If they are thus repugnant, one or the other of three consequences will result. Either the deed will (1) be made hopelessly vague and indefinite, and will therefore be void altogether; or (2) that description is adopted which is most certain, though it may not be the one really intended; or (3) that portion which is repugnant may be rejected altogether, and if a sufficient description remains to identify the property intended to be transferred the deed will stand; or (4) that interpretation of ambiguous descriptive words may be adopted which would be most beneficial to the grantee.⁵⁹

§ 929. Same—Various Methods of Describing Land in Conveyances—Enumeration. Aside from the very dangerous and unsuitable method of describing the land conveyed in general terms, such as "the —— estate," or "the —— farm," or "the —— mill," or such and such "woods" or "mountain lands," or "all my real estate," etc., which, even though they may suffice to pass the land intended, are obnoxious to the objection that they describe it by means of attributes more or less transient and temporary, and therefore liable to change with time, so that in the course of years the land conveyed may become increasingly difficult of identification,⁶⁰ the methods of description most usually employed in conveyances as furnishing lasting and permanent means of identifying the land are the following: (1) Description by government survey, though this does not exist in the older states; (2) description by reference to a plat or map; (3) description by monuments, courses and distances, or by metes and bounds; (4) description of city lots by reference to streets and numbers; (5) description by reference to prior conveyance; (6) description by the quantity of land or the number of acres; (7) the effect of a deed in including

⁵⁸ 2 Min. Insts. 1063; Day v. Trigg, 1 P. Wms. 286; Doe v. Galloway, 5 B. & Ad. 43; Goodtitle v. Southern, 1 M. & S. 299; Boardman v. Reed, 6 Pet. 345, 8 L. Ed. 415; Hathaway v. Juneau, 15 Wis. 264; Flanary v. Kane, 102 Va. 547, 46 S. E. 312, 681.

⁵⁹ 3 Washburn, Real Prop. (6th Ed.) § 2315 et seq.

⁶⁰ See 2 Tiffany, Real Prop. § 387.

buildings, privileges and appurtenances along with the land conveyed.

§ 930. **Same—I. Description by Government Survey.** In those newer states of the Union, which have been carved out of the public domains of the United States, it is customary to describe land conveyed in accordance with the system of "rectangular surveys" established long since by act of Congress.⁶¹ Mr. Tiffany, in his excellent treatise on the law of Real Property, describes this system as follows:⁶²

"By this system, the public lands are divided into 'townships,' each six miles square, these being formed by lines running east and west, six miles apart, which are crossed at intervals of six miles by lines running north and south. Each township, thus including approximately thirty-six square miles, is divided into thirty-six rectangular portions, each one mile square, called a 'section.' A section is the smallest subdivision of which the lines are actually run on the ground, but smaller subdivisions are recognized, there being the 'quarter section,' containing one hundred and sixty acres, formed by running lines at right angles from points on the section boundaries half way between the corners, and 'quarter quarter sections' of forty acres each. The areas of the various divisions do not, however, always correspond exactly to the figures above given, owing to irregularities in the land and the convergence of the meridians, as one goes further north.

"Each tier of townships, running north and south, is known as a 'range,' and the range is described with reference to a line known as the 'principal meridian'; while each tier of townships, running east and west, is described with reference to some parallel of latitude taken as a 'principal base line.' Thus, a township is referred to as being a certain number north or south of a certain base line, and a certain number east or west of a certain meridian.

"The thirty-six sections in the township are numbered consecutively, beginning at the northeast corner and counting west therefrom, and then proceeding east on the tier of sections next below, and so on until section thirty-six is reached in the southeast corner.

"The quarter section or quarter quarter section is defined with reference to the section of which it forms a part, as when one conveys 'the southeast quarter of the northwest quarter of section ten, in township thirty-five north, range five east.'"

§ 931. **Same—II. Description by Reference to Plat or Map.** A reference in the conveyance to a plat or map for the purpose of

⁶¹ Rev. St. § 2395 et seq. (U. S. Comp. St. 1901, p. 1471).

⁶² 2 Tiffany, Real Prop. § 388. See, also, Warvelle, Abst. Tit. 138 et seq.

describing the land conveyed makes such plat or map in effect a part of the conveyance, and it may then be used to identify the land.⁶³ But in such case care should be taken to have the plat recorded along with the deed (unless it has already been recorded in connection with some prior deed), or else the means of identification of the property is liable to be lost or destroyed.

This method of description is quite usual in case of a large tract of land divided into smaller lots for purposes of sale, such lots being first carefully surveyed and then numbered upon the plat, and upon their transfer described either by metes and bounds, corresponding to the survey, or by their number upon the plat or map, or both.⁶⁴

§ 932. Same—III. Description by Monuments, Courses and Distances, or by Metes and Bounds. In those older states, which have not the advantage of the government survey, as previously described,⁶⁵ the most usual and safest method of describing land, at least country land, is by metes and bounds; that is, by the selection of certain landmarks or “monuments” of as permanent a nature as possible, situated at the angles of the boundary lines, and by survey marking the courses and distances between them. The accurate description of these monuments (if permanent) and the accurate statement of the courses and distances between them constitute perhaps the best and safest description practicable, in the absence of a government survey.

The purpose, of course, is to mark out the boundaries by mathematical lines, and to this end monuments are not essential, though very useful for the purpose of correcting defective measurements. Usually, both monuments and courses and distances are employed, and, if there be any irreconcilable divergence between them, the courts will look to the intention of the parties, so far as it can be ascertained, to determine which should prevail. But, in the absence of evidence of intention on this point, the general presumption is that a call for fixed monuments is to take precedence over inconsistent calls for courses and distances, upon the theory that the former are more apt to have been in the minds of the parties than mere imaginary mathematical lines.⁶⁶

⁶³ 2 Tiffany, Real Prop. § 389; *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135; *Deery v. Cray*, 10 Wall. 263, 19 L. Ed. 887; *Borough of Birmingham v. Anderson*, 48 Pa. 253; *Nichols v. New England Furniture Co.*, 100 Mich. 230, 59 N. W. 155; *Sears v. King*, 91 Ga. 577, 18 S. E. 830; *Sanders v. Ransom*, 37 Fla. 457, 20 South. 530.

⁶⁴ See 2 Tiffany, Real Prop. § 389.

⁶⁵ Ante, § 930.

⁶⁶ 2 Min. Insts. 22, 23; 2 Tiffany, Real Prop. § 390; *Fentress v. Pocahontas*

So, also, in case of a conflict between the distance of one line and the course of another, the general rule is that the intention of the parties shall control, and no arbitrary rule can be laid down that the distance must yield to the course, or vice versa.⁶⁷

A "monument" consists of any object or mark on the land which may serve to locate the boundary line at a given point. It may be a river, rock, tree, or other natural object, more or less permanent, or it may be artificial, as a wall, post, ditch or road.⁶⁸ If a corner monument be itself a part of adjoining land or a structure thereon, as a house, which includes the land under it, the boundary, in the absence of evidence of a contrary intent, will begin at or extend to the side or edge of the monument only.⁶⁹ But if the monument does not itself constitute land, nor involve the occupation of land, such as a river, highway, wall, tree or post, the boundary line in general extends to the center thereof.⁷⁰

A "course" is the direction in which a line runs, stated with reference, not to its terminus, but to its correspondence with a certain point of the compass;⁷¹ while surveyors' tables of measurements are ordinarily used in measuring the distances, that is, rods, perches, poles, etc.

§ 933. Same—IV. Description of City Lots by Reference to Streets and Numbers. While the conveyance of a house in a city by its street and number is a sufficiently certain description, it would be imprudent to depend upon that alone, as the system of numbering might at any time be altered, and the possibility might throw doubt and uncertainty around the title.

The system of streets in a city, however, is sufficiently permanent to be regarded as a good monument from which the calls for distances may be made. Caution must be exercised, however,

Fowling Club, 108 Va. 155, 60 S. E. 633; *Newsom v. Pryor*, 7 Wheat. 10, 5 L. Ed. 382; *White v. Luning*, 93 U. S. 514, 23 L. Ed. 938; *Murdock v. Chapman*, 9 Gray (Mass.) 156; *Pernam v. Wead*, 6 Mass. 131; *Buffalo, N. Y. & E. R. Co. v. Stigeler*, 61 N. Y. 348; *White v. Williams*, 48 N. Y. 344; *Cox v. Couch*, 8 Pa. 147; *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Johnson v. Archibald*, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27.

⁶⁷ *Green v. Pennington*, 105 Va. 808, 54 S. E. 877; *Ruffner v. Hill*, 31 W. Va. 434, 7 S. E. 13; *Preston v. Bowmar*, 2 Bibb (Ky.) 493; *Loring v. Norton*, 8 Me. 61; *Scammon v. Sawyer*, 4 Me. 429.

⁶⁸ 2 Tiffany, Real Prop. § 390.

⁶⁹ *Schwalm v. Beardsley*, 106 Va. 409, 56 S. E. 135; *City of Boston v. Richardson*, 13 Allen (Mass.) 146, 154.

⁷⁰ *Schwalm v. Beardsley*, 106 Va. 409, 56 S. E. 135; *City of Boston v. Richardson*, 13 Allen (Mass.) 146, 154; *Freeman v. Bellegarde*, 108 Cal. 179, 41 Pac. 289, 49 Am. St. Rep. 76; *Warner v. Southworth*, 6 Conn. 471; *Warfel v. Knott*, 128 Pa. 528, 532, 18 Atl. 390.

⁷¹ 2 Tiffany, Real Prop. § 390.

in such descriptions, to give accurately, with reference to the points of the compass or otherwise, the particular corners of the intersecting streets from which the measurements are to be made, as well as the directions or courses and distances.⁷² The distances in such cases are usually measured by feet and inches.

§ 934. **Same—V. Description by Reference to a Prior Conveyance.** It is quite usual in describing land conveyed in a deed to refer to a prior deed conveying the same land, whereby the description contained in the prior deed is made part of the latter. If the first description is accurate, and the land conveyed by both deeds is identically the same tract, neither more nor less, this is an excellent mode of describing land, as it tends to prevent, rather than to create, confusion in the title.⁷³

§ 935. **Same—VI. Description by Quantity of Land or Number of Acres.** This, like the last mentioned, is generally used merely as a subordinate and inferior mode of describing the land conveyed. Indeed, it is not a description of boundaries at all, but is sometimes useful as corrective or cumulative matter of description. If, however, it is inconsistent with the other more important and valuable elements of description, it must give way to them. Thus, where the quantity, or estimated quantity, of land to be transferred is inconsistent with the calls for monuments or courses and distances, or with a description in a prior deed to which reference is made, it must yield to them.⁷⁴

§ 936. **Same—VII. Effect of Deed in Passing with the Land All Buildings, Privileges and Appurtenances.** "Land, in the legal signification," says Lord Coke, "comprehendeth any ground, soil or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furzes and heath." "It legally includeth also castles, houses and other buildings."⁷⁵ And from the same authority we learn that all things appendant and appurtenant to the land, as incidents or adjuncts thereto, such as easements, profits à prendre, etc., shall pass with the manor, without express mention.⁷⁶ But

⁷² See *Clark v. Hutzler*, 96 Va. 73, 30 S. E. 469.

⁷³ *Langmaid v. Higgins*, 129 Mass. 353.

⁷⁴ *Reid v. Rhodes*, 106 Va. 701, 56 S. E. 722; *Doe ex dem. Arden v. Thompson*, 5 Cow. (N. Y.) 371; *Petts v. Gaw*, 15 Pa. 218; *Emery v. Fowler*, 38 Me. 99; *Thompson v. Sheppard*, 85 Ala. 611, 5 South. 334; *Doe ex dem. Phillip's Heirs v. Porter*, 3 Ark. 18, 36 Am. Dec. 448; *Ray v. Pease*, 95 Ga. 153, 22 S. E. 190.

⁷⁵ 1 Th. Co. Lit. 197; 2 Min. Insts. 918.

⁷⁶ 1 Th. Co. Lit. 205; 2 Min. Insts. 918.

land cannot be appurtenant to other land, so as to pass by deed, unless it comes within the description contained in the deed.⁷⁷

All these propositions, namely, that the grant of land at common law carries with it, as included therein, without express mention, all trees, houses and other buildings (for *cujus est solum, ejus est usque ad coelum*), and also things appendant and appurtenant thereto, are well settled.⁷⁸

§ 937. The Consideration Supporting the Deed—Discussion Outlined. The important and extensive subject of the consideration to support a conveyance may be developed under the following heads: (1) Effect of want of consideration; (2) effect of a recital in the conveyance of the payment of the consideration; (3) illegal considerations; (4) considerations involving fraud; (5) considerations involving mistake or misapprehension.

§ 938. I. Effect of Want of Consideration. As between the parties, a conveyance needs no consideration to support it, being an executed contract, except that, at common law, in order that a deed may take effect as a bargain and sale under the statute of uses, a valuable consideration must move from the bargainee, and, in order that it may operate as a covenant to stand seised, there must be, at common law, a consideration of natural love and affection; that is, the covenantee must be nearly related to the covenantor by blood or affinity.⁷⁹

Before leaving this branch of the subject, it may be observed that a consideration, the performance of which is utterly and naturally impossible, can confer no benefit, and is therefore equivalent to no consideration at all; nor will the law notice an act that is obviously impracticable and ridiculous, as that A. shall go from San Francisco to London in an hour. In such cases, the situation is the same as if no consideration at all were mentioned in the conveyance.⁸⁰

§ 939. II. Effect of Recital in Conveyance of Payment of Consideration. Where there is a valuable consideration to support the conveyance, it is usual to recite the fact in the conveyance, as well as the amount thereof; and indeed, even in cases of gift, it is quite usual, though scarcely necessary in modern times, to recite the payment of a nominal consideration, such as one dollar, upon the theory that there should be a valuable consideration to support

⁷⁷ *Riddle v. Littlefield*, 53 N. H. 508, 16 Am. Rep. 388; 3 Washburn, Real Prop. (6th Ed.) § 2308.

⁷⁸ 2 Min. Insts. 919; Sheppard's Touchst. 89 et seq., where ample explanations and illustrations are given.

⁷⁹ Ante, §§ 400, 404; 2 Min. Insts. 807, 809.

⁸⁰ 2 Min. Insts. 703; 1 Chitty, Cont. 64.

the deed as a bargain and sale, and also in order to rebut any implication of a resulting trust in favor of the grantor.⁸¹ *E converso*, the recited consideration can never be questioned or contradicted, as between the parties, (1) for the purpose of showing that the deed was not founded on a valuable consideration, and so defeat it; or (2) for the purpose of raising a resulting trust in the grantor, especially where a third person, in reliance upon such recital, has acquired rights thereunder. In the absence of fraud or mistake, the recital must be treated as conclusive for the purpose of giving effect to the operative words of the conveyance.⁸²

It is also customary, where the whole or part of the consideration has been paid in cash at the time of the conveyance, to acknowledge therein the receipt of so much as has been paid, and such acknowledgment or recital is, as between the parties, conclusive of the fact that there was a valuable consideration, for the purpose of supporting the conveyance.⁸³ But it is not conclusive either upon the parties or upon third persons as to the amount of the consideration paid or due.⁸⁴ Indeed, as to third persons having no connection with the deed, such a recital, even though in writing and under seal, is mere hearsay, and will not ordinarily be received in evidence at all.⁸⁵

§ 940. **III. Illegal Considerations in General.** The law habitually seeks to discourage the doing of illegal acts or acts contrary to public policy, and, in the main, experience has proved that the best way to discourage them is to leave either guilty party without

⁸¹ *Ante*, § 415; 2 Min. Insts. 219, 807; 2 Tiffany, Real Prop. § 384; 2 Story, Eq. Jur. § 1199; *Watkins v. Robertson*, 105 Va. 284 et seq., 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880; *Gould v. Lynde*, 114 Mass. 366; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 484, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Moore v. Jordan*, 65 Miss. 229, 3 South. 737, 7 Am. St. Rep. 641.

⁸² *Trafton v. Hawes*, 102 Mass. 541, 3 Am. Rep. 494.

⁸³ 2 Tiffany, Real Prop. § 384; 2 Pomeroy, Eq. Jur. § 1036; *Devlin, Deeds*, § 834; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Finlayson v. Finlayson*, 17 Or. 347, 21 Pac. 57, 3 L. R. A. 801, 11 Am. St. Rep. 836; *Russ v. Mebius*, 16 Cal. 350.

⁸⁴ 2 Min. Insts. 689, 690; 1 Greenleaf, Ev. § 26, note (1); *Harvey v. Alexander*, 1 Rand. (Va.) 219, 10 Am. Dec. 519; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Hebbard v. Haughian*, 70 N. Y. 54; *Wilkinson v. Scott*, 17 Mass. 249; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Byers v. Locke*, 93 Cal. 493, 29 Pac. 119, 27 Am. St. Rep. 212; *Michael v. Foil*, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577.

⁸⁵ *Lamar v. Hale*, 79 Va. 147; *Bugg v. Seay*, 107 Va. 650, 651, 60 S. E. 89, 122 Am. St. Rep. 877; *Henry v. Raiman*, 25 Pa. 360, 64 Am. Dec. 703; note to *Basset v. Nosworthy*, 2 White & Tud. Lead. Cas. Eq. 100.

redress from the courts in case the other equally guilty party shall have taken undue advantage of him.

This general principle finds expression in two maxims which the courts have frequent occasion to use, namely: (1) That no one alleging his own fraud is to be heard (*nemo allegans suam turpitudinem audiendus est*); and (2) that in case of equal guilt, the position of the defendant (or party in possession) is superior (*in pari delicto, conditio defendantis [or possidentis] melior est*).⁸⁶

The general principle is that the plaintiff is denied relief. But the plaintiff will be the one party or the other according as the contract is executory or executed. If S. (vendor) and P. (vendee), for an illegal consideration, enter into a transaction touching the transfer of land, if it be an executory contract for the sale of the land, P. will in general be the plaintiff who would be denied relief in the courts; whereas, if the contract were an executed conveyance, S. would more usually be the plaintiff to whom relief would be denied, and P. might retain possession of the land secure from attack by S. on the ground of the illegality of the consideration.

Illegal considerations are of various kinds, consisting of such as are illegal because of their violations of general public policy, as well as of some positive rule of law or statute.

To the first class belong considerations of an immoral character or tendency (*pro turpi causa*), such as a consideration of future illicit cohabitation;⁸⁷ or considerations involving unreasonable restraint of trade, or affecting freedom of marriage.⁸⁸

As to considerations declared illegal by statute, not only is every contract and conveyance void which touches what is expressly prohibited by statute, but also in general where the statute only inflicts a penalty; for a penalty usually implies a prohibition, or, at all events, indicates a policy of the law which the transaction tends to thwart. No suit lies at law or in equity to enforce or give effect to what is thus at war with public policy. It is conceivable, however, that the penalty is not designed to prevent the transaction

⁸⁶ Post, § 951; 2 Min. Insts. 676.

⁸⁷ 2 Min. Insts. 282, 664; 2 Th. Co. Lit. 24, note (P). If the consideration be past cohabitation with an unmarried woman, it would be good, upon the presumption that it is intended as a compensation for the wrong done. But if either party were married, and that fact were known to the other at the time, the consideration is deemed illegal, whether it be of past or future cohabitation. 2 Min. Insts. 282; 2 Th. Co. Lit. 24, note (P).

⁸⁸ All these have been treated more or less fully in connection with conditions, to which the student is referred. See ante, § 566 et seq.; 2 Min. Insts. 664, 282, 283.

in question, but to attain a collateral object, as, for example, to induce the payment of taxes assessed upon licenses for the conduct of certain business avocations; and where such is the case, the contract or conveyance remains unimpaired.⁸⁹

§ 941. **IV. Considerations Involving Fraud—Discussion Outlined.** There are various kinds of fraudulent transactions, which, as they relate to the conveyance of land, may be classified as follows: (1) Fraud in the execution of a deed, or fraud in *esse contractus*; and (2) fraud in the procurement of the deed or fraudulent considerations.

The second of these divisions may be subdivided into the following heads: (1) Frauds worked upon a party to the transaction, under which head may be considered: (a) Actual fraudulent representations or concealments; (b) fraud manifested in inequitable bargains; and (c) fraud presumed from the circumstances and condition of the parties. (2) Frauds worked upon third persons, wherein we shall consider: (a) Fraudulent and catching bargains with heirs, reversioners and other expectants; (b) conveyances in fraud of third persons generally; and (c) conveyances in fraud of creditors and purchasers.

These will be discussed in consecutive order.

§ 942. **A. Fraud in *Esse Contractus*, That is, in the Execution of the Conveyance.** The common law allows fraud to be proved, in order to vacate a deed, where the fraud relates to the execution of the instrument (fraud in *esse contractus*), as where it is misread to the party, or he is induced to sign one instrument when he intended to sign another, but not where the alleged fraud consists in imposing upon the party in a settlement of accounts, or by a false or fraudulent statement of facts, and the like.⁹⁰

§ 943. **B. Fraud in the Procurement or Inducement Directed against a Party to the Deed—1. Actual Fraudulent Representations or Concealments.** This is the plainest and simplest case of fraudulent consideration, which assumes many guises. It needs little exposition.

It comprises those cases which arise out of the suggestion of falsehood (*suggestio falsi*) or the suppression of truth (*suppressio veri*). The suggestion of falsehood is a misrepresentation, by acts or artifice, as well as by assertion, whether with intent to deceive or

⁸⁹ 2 Min. Insts. 665; 3 Min. Insts. 99 et seq.; 1 Parsons, Cont. 382, note (d); Little v. Poole, 9 B. & Cr. 192; Cope v. Rowland, 2 M. & W. 157 et seq.; Smith v. Mawhood, 14 M. & W. 452; Cundell v. Dawson, 4 C. B. 397; Tabb v. Baird, 3 Call (Va.) 475.

⁹⁰ 2 Min. Insts. 669.

not, if it actually did deceive, of something material, in regard to which a known trust or confidence was placed in the party misrepresenting, by the other party, which matter constituted an inducement or motive to the act or omission of the party to whom the misrepresentation was made, and by which he was actually misled to his injury; and the suppression of truth is an undue concealment or nondisclosure of facts and circumstances which one party is under a legal or equitable obligation to communicate, and which the other party has a right, not merely in conscience, but *juris et de jure*, to know. Thus, where an heir at law, who knew not that the will which devised the estate away from him was defectively executed, for a trifling sum of money released all his right in the land to the devisee, by a deed which recited that the will was duly executed, it was held that the recital that the will was duly executed was *suggestio falsi*, and that the concealment from the heir that the will was not duly executed was *suppressio veri*, either of which, and much more both, would invalidate the deed of release.⁹¹

It must be observed, however, that fraud is never to be presumed. It must be distinctly alleged, although it is not necessary to charge it in direct terms, if the facts stated make out a case of fraud, and it must be clearly proved as alleged. But the statement that fraud is never to be presumed must be understood in its correct sense. As a matter of fact, in the great majority of cases, fraud is of that secret nature which can only be established by circumstantial evidence and by inferences from known facts. It is not, therefore, meant to say that fraud can never be inferred from facts proved to exist, but merely that there shall be no presumption of the existence of facts from which fraud may be inferred, since that would be to found a presumption upon a presumption, which the law abhors as nature a vacuum.⁹²

§ 944. Same—2. Fraud Manifested in Inequitable Bargains. Here the fraud is apparent from the intrinsic nature and subject

⁹¹ 2 Min. Insts. 670; 1 Min. Insts. 248; 1 Story, Eq. Jur. § 191 et seq.; 2 Pomeroy, Eq. Jur. § 886 et seq.; Broderick v. Broderick, 1 P. Wms. 239. See Lee v. Monroe, 7 Cr. 368; Smith v. Richards, 13 Pet. 26, 10 L. Ed. 42; Rorer Iron Co. v. Trout, 83 Va. 406, 2 S. E. 713, 5 Am. St. Rep. 285. Even in judicial sales under a decree of court, if it be made to appear, either before or after the sale has been confirmed, that there has been any injurious mistake, misrepresentation, or fraud, the biddings should be opened, the reported sale rejected, or the order of confirmation rescinded, and the property resold. Merchants' Bank v. Campbell, 75 Va. 455, 462, 463; 2 Min. Insts. 670.

⁹² Bump, Fraud. Conv. c. 4. See Burch v. Smith, 15 Tex. 219, 65 Am. Dec. 160, note.

of the bargain itself, being such as no man in his senses and not under a delusion would make, on the one hand, and no honest and fair man would accept, on the other.⁹³

Mere inadequacy of price, standing by itself and independent of other circumstances, is not sufficient to set aside a transaction. But inadequacy, accompanied by other circumstances (e. g., weakness of understanding in the grantor or grantee; fraud, imposition, mutual mistake, or standing in a relation of influence), may readily make out a case of fraud;⁹⁴ and it is said that if the inadequacy be so gross and manifest that it cannot be stated to a man of common sense without shocking the conscience and confounding the judgment, it suffices of itself (in the absence of adequate explanation) to prove that a fraudulent advantage was taken, as it shows that the person did not understand the bargain he made, or that he was so oppressed that he was glad to make it, knowing its inadequacy.⁹⁵

§ 945. Same—3. Fraud Presumed from the Circumstances and Condition of the Parties. This class comprehends cases where advantage has been taken of the mental weakness, or of the necessities or actual condition, of one of the contracting parties, putting him under the power of the other, or of undue influence arising out of the nature of the social relation in which the parties stand to each other, or of business relations inconsistent for the time being with the transaction in question.⁹⁶

Weakness of mind alone, where there is a legal capacity for business, does not invalidate an instrument; but if connected with any circumstances of surprise, inadequate consideration, undue influence, or the like, it affords strong and, in general, satisfactory proof of fraud. The question always is whether the party has yielded an intelligent and willing consent to the transaction; and if it appear, considering all the facts—mental weakness being one—that such consent is wanting, the act is void. But the influence resulting from attachment, or the mere desire to gratify another's wishes, if the party's free agency be not impaired, does not affect the validity of the act any more than does the fact that it seems to others unreasonable, imprudent, or unaccountable.⁹⁷

⁹³ 2 Min. Insts. 671.

⁹⁴ 2 Min. Insts. 671; *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260.

⁹⁵ 2 Min. Insts. 671; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 23, 7 Am. Dec. 513, 1 White & Tud. Lead. Cas. Eq. 420.

⁹⁶ 2 Min. Insts. 672.

⁹⁷ 2 Min. Insts. 672; 1 Jarman, Wills, 35 et seq.; 1 Redfield, Wills, 509 et seq., 514 et seq.

Transactions between attorney and client, parent and child, guardian and ward, and other persons connected by peculiarly confidential relations, are looked upon with jealousy, and if improper advantage is taken of the parental or tutorial authority, or of the influence belonging to the relation, the transaction will be invalidated; and, as between guardian and ward, it is established that a deed of gift, or a release made by the ward soon after coming of age, and at the very time of accounting and delivering up the estate, or before delivering up the estate, without any settlement, is absolutely void, upon a principle of public policy, as constructively fraudulent, although, in truth, it be fair, and much more if the circumstances evince actual fraud.⁹⁸ Moreover, trustees, agents, attorneys, and other persons occupying a fiduciary relation, are peremptorily inhibited from dealing for their own benefit touching the subject matter committed to them; and any such transactions are regarded as constructively fraudulent, and voidable at the election of the beneficiary.⁹⁹

It should be observed, however, that where a legal capacity is shown to exist, that the party had sufficient understanding to comprehend clearly the nature of the business, that he consented freely to the special matter about which he was engaged, and no fraud or undue influence is shown to have been used to bring about the result, the validity of the disposition cannot be impeached, however unreasonable, or imprudent, or unaccountable it may seem to others.¹

§ 946. C. Fraud in the Procurement or Inducement, Directed against Third Persons—(A) Catching Bargains with Heirs, Reversioners and Other Expectants. Bargains made with or conveyances taken from heirs, reversioners, or other expectants, in the lifetime of their ancestors or relations, from whom is the expectation of the estate, tend to deceive and disappoint the relations from whom the expected property is to be derived.²

These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. The proof of fraud is generally supplied by inference from the circumstances or condition of the

⁹⁸ 2 Min. Insts. 672, 673; 1 Story, Eq. Jur. § 317 et seq.; 1 Jarman, Wills, 36 et seq., note (1). A similar principle is applicable to grants obtained by a person having a spiritual ascendancy over another who is in a state of religious delusion or extravagant excitement. 2 Min. Insts. 673; Norton v. Kelley, 2 Eden, 286; Hugein v. Baseley, 14 Ves. 273.

⁹⁹ Ante, § 424 et seq.; 2 Min. Insts. 245; 1 Story, Eq. Jur. § 311 et seq.

¹ 2 Min. Insts. 673.

² 2 Min. Insts. 698.

parties contracting—weakness on one side, and usury, or extortion taking advantage of weakness, on the other. The nature of the bargain, e. g., its unconscionableness, although there be no circumvention, often detects the fraud. And in most cases have concurred deceit and illusion practiced on other persons not privy to the agreement, as on the father or other relation from whom comes the expectation of the estate. The expectant has been induced to conceal his circumstances from those whose advice and encouragement might have tended to his relief, and also to his reformation; and the ancestor being deceived to leave his estate, not as he designed, to his heir or family, but to the artful intriguers who have already divided the spoil.³

In all cases of this sort, it is incumbent upon the party dealing with the expectant to establish, not only that he took no advantage, and was guilty of no direct fraud, but that he paid a full and adequate consideration, and that the contract is above all exception.⁴

Indeed, the better opinion, in this country, at least, seems to be that an expectant heir or devisee has no interest in the ancestor's or testator's estate, during the latter's lifetime, that can be sold, incumbered or devised.⁵

In England this doctrine has been applied not only to expectant heirs, but also (with doubtful expediency) to reversioners and remaindermen, dealing with property already vested in them, but not in possession, and, therefore, apt to be under-estimated by the necessitous, the improvident and the young.⁶

But this English rule of policy, which deprives the owner of a vested remainder or reversion of the free alienation of his property, and, obliging him to forego any benefit which he might derive by negotiating a private sale thereof, constrains him to sell at public auction (so as to afford satisfactory proof of an adequate price), or to hold on to an unproductive reversion or remainder, perhaps till the decline of life, is not adapted to the usages or sentiments of society in this country. The adult proprietor of a vested interest in property, whether in reversion or remainder, is not thus

³ 2 Min. Insts. 698; 1 Story, Eq. Jur. § 334.

⁴ 2 Min. Insts. 698; 1 Story, Eq. Jur. § 336; *Chesterfield v. Janssen*, 2 Ves. Sr. 155 et seq., 1 White & Tud. Lead. Cas. Eq. 410.

⁵ *Wheeler v. Wheeler*, 2 Metc. (Ky.) 474, 74 Am. Dec. 421; *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85, note. But in Indiana it has been held that he can do so with the consent of the ancestor. *McClure v. Raben*, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 588. See *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651, 654, note.

⁶ 2 Min. Insts. 698; 1 Story, Eq. Jur. § 337 et seq.; *Chesterfield v. Janssen*, 2 Ves. Sr. 155 et seq.; 1 White & Tud. Lead. Cas. Eq. 410, 411.

to be reduced to a condition of pupillage, from regard to any such supposed rule of policy, or for the purpose of extending to him an ambiguous protection. All attempts thus to fetter the action of the owner by restricting his power of alienation, really operate injuriously to him. The doctrine of imputing fraud as a matter of law is not favored with us.

The inquiry, in such cases as we are considering, should be whether in the particular case actual fraud existed. Inadequacy of price, youth, inexperience, indebtedness, distress, are circumstances to be looked to and weighed in determining whether, in the particular instance, the bargain is so unconscionable as to demonstrate some gross imposition, circumvention, or undue influence; and so to justify relief on the ground of fraud. In the absence of such proof of actual fraud, it is not incumbent on the purchaser of such an interest in the way of a reversion or remainder, more than in the case of property in possession, in order to make good the bargain, to show that a full and adequate consideration was paid.⁷

§ 947. (B) Fraud Directed against Third Persons Generally. "Particular persons in contracts," says Lord Hardwicke in *Chesterfield v. Janssen*,⁸ "shall not only transact bona fide between themselves, but shall not transact mala fide in respect of other persons, who stand in such relation to either as to be affected by the contract, or the consequences of it." Hence clandestine agreements to return part of the portion of the wife, or provision stipulated for by the husband, to the parent or guardian; or conveyances or bonds taken as rewards for securing marriages; or a secret agreement of a debtor compounding with his creditors, that if a certain one of them will sign the deed, he will pay him more than a ratable proportion of his debt—all these will be set aside in equity, as injurious to the third persons who are thereby respectively deceived.⁹

So a conveyance made by a feme sole, in contemplation of marriage, without the intended husband's knowledge, is deemed in fraud of his marital rights, and therefore voidable;¹⁰ and by parity

⁷ 2 Min. Insts. 699; *Nichols v. Gould*, 2 Ves. Sr. 422; *Griffith v. Spratley*, 1 Cox, 383; *Cribbins v. Markwood*, 13 Grat. (Va.) 507, 508, 67 Am. Dec. 775; *Watson v. Smith*, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665; *Stott v. Franey*, 20 Or. 410, 26 Pac. 271, 23 Am. St. Rep. 135, note; *Moody v. Wright*, 13 Metc. (Mass.) 17, 46 Am. Dec. 713, note.

⁸ 2 Ves. Sr. 165, 1 White & Tud. Lead. Cas. Eq. 406, 407.

⁹ 2 Min. Insts. 673, 674; *Chesterfield v. Janssen*, 2 Ves. Sr. 156, 1 White & Tud. Lead. Cas. Eq. 406, 407.

¹⁰ Ante, § 271; 2 Min. Insts. 674. This principle, however, is subject to several qualifications. Thus it is admissible for the wife, in contemplation

of reason, if a man seised in fee of lands should, just before his marriage, without the privity of the intended wife, convey the same, it deprives the wife of her dower therein, and is liable to be invalidated at her instance, as in fraud of her rights.¹¹

§ 948. (C) **Conveyances in Fraud of Creditors.** The English statute of 13 Eliz. c. 5, enacted that any transfer of real or personal property which was made with the intent to hinder, delay and defraud the creditors of the transferrer, should be absolutely void as to such creditors, saving only the rights of bona fide purchasers for a valuable consideration. The provisions of this statute have been adopted everywhere in this country, either by express statute, or as part of the common law of the states.¹²

As between grantor and grantee, no conveyance is affected by this rule; but, notwithstanding the fact that a conveyance may have actually passed the title to land into a grantee, a creditor of the grantor is enabled to levy his execution on the land in the hands of the grantee and cause it to be sold as the property of the grantor.¹³

No bona fide purchaser for a valuable consideration is affected by the rule; but neither the payment of a full price, nor actual ignorance of the grantor's intent to hinder, delay, or defraud his creditors, will avail a grantee who purchases with imputed notice of his grantor's intent.¹⁴

§ 949. **Same—The Grantor's Intent.** The law presumes that a man intends the natural consequences of his acts. Therefore, wherever a conveyance has the effect of hindering or delaying a creditor in collecting, by the ordinary legal processes, what the grantor owes him, the law conclusively presumes the conveyance to be in fraud of creditors, and therefore void as to them, unless the grantee is a purchaser in good faith for a valuable consideration.¹⁵ And it is immaterial that the actual motive for the transfer is the

of marriage, to convey her property without the husband's knowledge in order to secure a just debt, and even to provide for the children of a previous marriage. She may also convey her property to whom she will, if it be done before the marriage is contemplated, notwithstanding it may, in fact, occur soon after. *Strathmore v. Bowes*, 2 Cox, 28, 1 Ves. Jr. 22, 1 White & Tud. Lead. Cas. Eq. 395; *Gregory v. Winston*, 23 Grat. (Va.) 102.

¹¹ 2 Min. Insts. 674.

¹² *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696.

¹³ 1 Story, Eq. Jur. § 353; *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687.

¹⁴ *Blennerhasset v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080.

¹⁵ *McDowell v. Steele*, 87 Ala. 493, 6 South. 283; *Fleischman v. Bowser*, 62 Fed. 259, 10 C. C. A. 370.

meritorious one of preserving it to be applied to the payment of the grantor's debts under circumstances more advantageous to his creditors. Thus a debtor may be threatened with executions at a time of general low prices, when a forced sale of his property would result in its sacrifice for an amount insufficient to pay his debts. Were he now to make any transfer of his property in order to preserve it until it could be sold to better advantage, with the full intention of applying it in whole to the payment of his creditors, it is a fraudulent transfer.¹⁶

But a transfer of property by a debtor to his creditor in payment of a pre-existing claim is not necessarily fraudulent, although the transaction results in defeating the collection of their claims by other creditors.¹⁷

§ 950. Same—The Form of the Transfer or Conveyance. It is immaterial what form of transfer a debtor adopts with the purpose or with the result of defrauding his creditors. The transaction may take the form of a straightout conveyance, of a mortgage or lien of any kind, of collusive legal proceedings,¹⁸ or even of a deed absolute on its face, intended as (and being actually as between the parties) a mortgage. The last case affords a good illustration of the proposition that any transaction that has the effect of deceiving creditors as to the amount of a debtor's property or the value of his interest therein is fraudulent. It is perfectly permissible for a debtor to mortgage his property to secure a pre-existing debt. But suppose the mortgage take the form of an absolute deed; the creditors, being informed of this deed, are naturally led to believe that their debtor no longer has any interest or estate in this property left which they could subject to the payment of their claims. The creditors are thus hindered and delayed, because they are misled into believing that their debtor has no interest left in the mortgaged property; whereas, in fact, he has an equity of redemption upon which they could have levied, had they known of it.¹⁹

§ 951. Same—Grantee's Participation in Grantor's Fraud. If the grantee knows of the grantor's fraudulent intent, the payment of a valuable consideration will not validate the conveyance.²⁰ Ac-

¹⁶ *Brown v. Osgood*, 25 Me. 505.

¹⁷ Preferential payments to creditors are permitted by the common law. *Brooks v. Marbury*, 11 Wheat. 78, 6 L. Ed. 423.

¹⁸ 20 Cyc. 392.

¹⁹ *Lukins v. Aird*, 6 Wall. 78, 18 L. Ed. 750; *Campbell v. Davis*, 85 Ala. 56, 4 South. 140; *Neubert v. Massman*, 37 Fla. 91, 19 South. 625.

²⁰ *Slagel v. Hoover*, 137 Ind. 314, 36 N. E. 1099; *Chandler v. Von Roeder*, 24 How. 224, 16 L. Ed. 633.

tual knowledge is not, however, necessary on the part of the grantee. Knowledge may be imputed to him. And while a purchaser is always permitted to open negotiations under the presumption that he is dealing with an honest man,²¹ nevertheless, if before the transaction is completed he learns of anything which would cause a man of ordinary business prudence to pause and inquire, and inquiry would have led to a knowledge of the grantor's fraudulent intent, notice will be imputed to him with the same effect as if he had had actual knowledge.²²

§ 952. Same—The Want of Consideration. As between the payment of one's debts and the performance of the most sacred natural obligations, the common law insists that the payment of debts must come first.²³ All conveyances not based upon a valuable consideration are termed "voluntary," and are void as against the creditors of the grantor—at least, the existing creditors. The consideration need not, as matter of law, be adequate; but serious inadequacy affords an indication of a lack of good faith on the part of the grantee. It is a suspicious circumstance, which increases in significance the greater the discrepancy between price and value.²⁴ It is a "badge of fraud."²⁵

§ 953. V. Considerations Involving Mistake or Misapprehension. In cases of plain mistake or misapprehension, though not the effect of fraud or contrivance, equity will rescind the conveyance, if the error goes essentially to the substance of the contract, so that the purchaser does not get what he bargained for, or the vendor sells that which he did not design to sell; or if the circumstances do not demand the total rescission of the contract, the court will give relief by adjusting a compensation between the parties.²⁶

The distinction chiefly to be here noted is between mistakes of law and mistakes of fact.

²¹ Jackson v. Glaze, 3 Okl. 143, 41 Pac. 79.

²² Norwood v. Washington, 136 Ala. 657, 33 South. 869; Mayer v. Wilkins, 37 Fla. 244, 19 South. 632; Tantum v. Green, 21 N. J. Eq. 364; Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286.

²³ Redfield v. Buck, 35 Conn. 328, 95 Am. Dec. 241; Seward v. Jackson, 8 Cow. (N. Y.) 406; Burton v. Leroy, 5 Sawy. 510, Fed. Cas. No. 2,217.

²⁴ Martin v. White, 115 Ga. 866, 42 S. E. 279; Bigelow v. Ayrault, 46 Barb. (N. Y.) 143; Willis v. Gattman, 53 Miss. 721.

²⁵ For other badges of fraud, see 20 Cyc. 439 et seq.

²⁶ 2 Min. Insts. 699; Gaw. v. Huffmap, 12 Grat. (Va.) 628. The student should note that in cases of trust, of mistake, of fraud, or contract, equity may entertain jurisdiction wherever the person is found within the state, although the lands lie beyond its limits. Davis v. Morriss, 76 Va. 21.

§ 954. (I) **Considerations Involving Mistakes of Law.** The general doctrine is that ignorance or mistake of the law does not affect contracts or conveyances. If they are entered into in good faith, and are free from misapprehension as to facts, although under a mistake of the law, they are for the most part valid.²⁷

In respect, however, to the vendor's or vendee's ignorance in law of the title he proposes to convey or to acquire, a number of cases, both in England and in this country, establish that, notwithstanding the general doctrine, and although there may not appear to be any fraud, a court of equity will not refuse to give relief under circumstances, by either rescinding the contract in whole or in part, or by otherwise decreeing compensation to one or other of the parties.²⁸

§ 955. (II) **Considerations Involving Mistakes of Fact.** Where an act is done or a conveyance executed under a mistake or ignorance of matter of fact, material to the transaction and an efficient inducement thereto, the general rule is that a court of equity will relieve by setting the conveyance or act aside. Thus, if A. buys land of B., to which B. is supposed to have a good title, and it turns out that, in consequence of facts unknown alike to both parties, he has no title at all, equity will cancel the transaction, and cause the purchase money to be restored to A., putting both parties in statu quo.²⁹ The mistake, however, must be made out by the clearest and most satisfactory testimony; the burden of proof being on the complainant.³⁰

Where there is a material mistake in the substance of the thing contracted for, so that the purchaser does not get substantially what he bargained for, and the seller parts with what he had no idea of selling the contract or conveyance ought to be vacated. To hold otherwise would be to make a contract for parties, rather than to enforce one.³¹

²⁷ 2 Min. Insts. 700; Zollman v. Moore, 21 Grat. (Va.) 313; Hunt v. Rhodes, 1 Pet. 15, 7 L. Ed. 27; Bank of U. S. v. Daniel, 12 Pet. 55, 9 L. Ed. 989.

²⁸ 2 Min. Insts. 700; 1 Story, Eq. Jur. §§ 120 et seq., 126, note (1); Bingham v. Bingham, 1 Ves. Sr. 126; Lansdowne v. Lansdowne, 2 Jac. & Walk. 205; Hunt v. Rousmanier, 8 Wheat. 214, 5 L. Ed. 589; Hunt v. Rhodes, 1 Pet. 15, 16, 7 L. Ed. 27; Brown v. Rice, 26 Grat. (Va.) 470 et seq.

²⁹ 2 Min. Insts. 700, 801, et seq.; 1 Story, Eq. Jur. § 140 et seq.

³⁰ 2 Min. Insts. 701; Woolam v. Hearn, 7 Ves. 211, 2 White & Tud. Lead. Cas. Eq. 540, 547, et seq., 558 et seq.; Henkle v. Assurance Co., 1 Ves. Sr. 317; Shelburn v. Inchiquin, 1 Bro. Ch. 338, 350; Major v. Ficklin, 85 Va. 737, 8 S. E. 715; Hudson Iron Co. v. Stockbridge Iron Co., 107 Mass. 290; Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 595, 630, 7 Am. Dec. 559.

³¹ 2 Min. Insts. 701.

But in respect to judicial sales the maxim "caveat emptor" applies with considerable strictness. The court undertakes to sell only the title, such as it is, of the parties to the suit, and the purchaser must ascertain for himself whether the title is liable to impeachment; and if he has just grounds of objection for want or defect of title, he must present them to the court before the confirmation of the sale. Ordinarily, objections after confirmation come too late.³²

§ 956. Effect upon a Deed, Validly Executed, of Matter Arising Ex Post Facto—Discussion Outlined. Supposing a deed to have been in every respect validly executed, there are certain circumstances which, occurring after its execution, may avoid it, or at least impair its effect. Those may be enumerated as follows: (1) Erasure, interlining, or other alteration; (2) breaking off or defacing the seal; (3) delivering it up to be cancelled; (4) disclaimer of title by the grantee; (5) disagreement of persons whose concurrence is necessary in order for the deed to stand.

§ 957. I. Effect of Erasure, Interlineation or Other Alteration—1. In Case of Contracts Executed. An important distinction as to the effect of an erasure, interlineation, or alteration in a deed, is between conveyances or contracts executed on the one side, and contracts executory on the other.

No erasure nor alteration in a conveyance, nor even the cancellation thereof by mutual consent of the parties, can divest an estate already vested by the operation of the deed; for that would be in conflict with the statute of conveyances. But, the estate being vested according to the original tenor of the deed, if the erasure or alteration makes it impossible to see what that was, and there is no extrinsic evidence to show it, such erasure or alteration may in that way be fatal to the title evidenced by the conveyance.³³

The fact, however, that the deed contains immaterial interlineations or alterations will not affect its value as evidence of title in an action for the land.³⁴

§ 958. Same—2. In Case of Contracts Executory—A. Alteration by a Stranger. In respect to the erasure or alteration of contracts executory, the most material consideration is whether it were made by a stranger, in which case it is styled a spoliation, or

³² 2 Min. Insts. 701.

³³ 2 Min. Insts. 738; 2 Bl. Com. 309, note (22); *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481. See *Gleason v. Hamilton*, 138 N. Y. 353, 34 N. E. 283, 21 L. R. A. 210; *Nickerson v. Swett*, 135 Mass. 514.

³⁴ 1 Greenleaf, Ev. §§ 566, 567.

by a party to the instrument, or one interested therein, when it is known as an alteration.³⁵

The alteration made by a stranger to the instrument—that is, a spoliation—in no wise affects the validity of the instrument, provided only the original tenor of it can be made to appear. The remedy upon the instrument thus changed may be either in a court of law or in equity; the latter forum obtaining cognizance, because formerly the courts of law declined to allow the contents of a deed to be proved otherwise than by the deed itself, and because, also, it was often necessary to demand a discovery upon oath of the original tenor of the writing, and, independently of statute, a court of law has no power to coerce a discovery.³⁶

§ 959. **Same—B. Alteration by Party to Contract or One Interested.** If the change be immaterial, or of such matter as the law itself would supply, and be made innocently, it does not affect the validity of the writing, which, however, is binding only according to its original terms and effect; and, if they cannot be proved, the instrument can, of course, avail nothing. But where the change relates to a matter material, or although it be immaterial, where it appears to have been made with an ill intent, the writing is avoided so far as it relates to what is executory. So far as it actually vests an estate, no subsequent alteration, by whomsoever made, or with what intent soever, can divest it, although, as already explained, it may defeat the estate by reason of the failure of proof.³⁷ Thus, where an alteration of the date of a bond in suit was made from 1878 to 1879, apparently without guilty intent on the part of either party, and not having the effect of barring action on the bond through the operation of the statute of limitations, it was held to be an immaterial alteration, innocently made, and therefore to be overlooked.³⁸

It should be observed that this doctrine is by no means confined to sealed instruments, but applies as well to all writings (including contracts to convey land). No party to any writing is to be allowed to tamper with it by any alteration, either material or made with a bad intent, without subjecting himself to the just penalty of thereby avoiding the instrument altogether, so far as its future effect is concerned. And it must be remembered that it is a well-

³⁵ 2 Min. Insts. 738; 1 Greenleaf, Ev. § 565 et seq.

³⁶ 2 Min. Insts. 738; 1 Greenleaf, Ev. § 565 et seq.

³⁷ 2 Min. Insts. 738, 739; 1 Greenleaf, Ev. § 565 et seq.; *Bashaw v. Wallace*, 101 Va. 733, 45 S. E. 290. As to what is a material, and what an immaterial, alteration, see *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 267 et seq., note.

³⁸ *Bashaw v. Wallace*, 101 Va. 733, 45 S. E. 290.

established principle that every endorsement or memorandum attached to the writing, with the knowledge of the parties, at the time of its execution, is as much a part of it as if it had been contained in the body of the instrument.³⁹

It is an important question, where an erasure, interlineation, or alteration appears, whether it was made prior or subsequent to the execution of the writing. It seems to be the better opinion (in pursuance of the maxim, "*Omnia rite acta præsumuntur*") that the presumption is that it was made before the execution, if nothing appear to the contrary, such as a difference in the color of the ink, or in the handwriting, and the like. When any such circumstance of suspicion occurs, it must, in general, be explained, in order to make the writing available.⁴⁰

The principle of erasure, etc., applies to the filling of blanks. Thus a blank filled after the paper is signed, without the consent of the party concerned therein, or his duly authorized agent, avoids the instrument. When the instrument is under seal, an agent to fill a blank must be empowered under seal, or by the personal presence and assent of the party to be affected.⁴¹

It is worth while to observe that a deed or writing may be considered as an entire transaction, operating as to the different parties from the time of execution by each, but not perfect till the execution by all. Any alteration made in the progress of such a transaction still leaves the instrument valid as to the parties previously executing it, provided the alteration does not affect their situation. Thus if, when A. executes the writing, there are blanks, which are filled up before B. executes it, but the filling up does not affect A., the obligation and effect of the writing as to A. is not thereby impaired.⁴²

It is usual and prudent, in order to obviate all suspicion and uncertainty, when any erasure, interlineation, or alteration is made in a deed or other writing, to note it as having been made before execution, at the foot of the deed, so as to be authenticated by the signature, or in the clause of attestation.⁴³

³⁹ 2 Min. Insts. 739.

⁴⁰ 2 Min. Insts. 739; 1 Greenleaf, Ev. § 564; 2 Th. Co. Lit. 232, note (13); 3 Th. Co. Lit. 371, note (11); 2 Parsons, Cont. 228, note (a); Beaman v. Russell, 20 Vt. 205, 49 Am. Dec. 775 et seq., 782, note; Slater v. Moore, 86 Va. 26, 9 S. E. 419.

⁴¹ 2 Min. Insts. 739; Sheppard's Touchst. 54; Drury v. Foster, 2 Wall, 24, 17 L. Ed. 780; Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266.

⁴² 2 Min. Insts. 740; 2 Bl. Com. 308, note (20); Doe v. Bingham, 4 B. & Ald. 675.

⁴³ 2 Min. Insts. 740; 3 Washburn, Real Prop. (6th Ed.) § 2097.

§ 960. **II. Effect of Breaking Off or Defacing the Seal.** It was originally held that if the seal of a deed was broken off, or so defaced that no sign of it could be seen (unless the party bound by the instrument did it), the deed was avoided; so that the avulsion of the seal was a species of erasure or alteration, and was governed in general by the same principles. The modern doctrine, however, is that if it appear that the seal has been affixed, and was afterwards broken off or defaced by accident, or by a stranger, the validity of the deed is not thereby affected. And an estate once vested is not divested by the destruction of the seal on the conveyance, whosoever did it, or with whatsoever intent; but, as a seal is requisite to make the instrument a deed, it will be needful to show that there was once a lawful seal.⁴⁴

§ 961. **III. Effect of Cancelling the Deed.** In this case, also, the distinction between executed contracts (or conveyances) and executory contracts is all-important. In the case of a conveyance, where the estate is once vested, the cancellation of the deed cannot divest it, because, as already explained, it would offend the statute of conveyances.⁴⁵ And yet there may arise cases in which the destruction of the deed with the intent to revest the estate in the grantor will practically have that effect, if coupled with other facts which would raise an estoppel against the grantee. Thus, if A. convey to B., who afterwards surrenders the deed with the request that A. destroy it, and executes a new conveyance to C., B. will be estopped to set up the fact that he ever owned the land and that his legal ownership never passed back to A.⁴⁶

But in the case of an executory contract, where the parties mutually agree that it shall be delivered up to be cancelled, that is, to have lines drawn over it in the form of lattice-work, or cancelli (though the phrase has long been used figuratively for any manner of obliteration or defacement), and it is cancelled accordingly or destroyed, the contract is avoided.⁴⁷

⁴⁴ 2 Min. Insts. 740; 2 Bl. Com. 308, note (21); *Bolton v. Bishop of Carlisle*, 2 H. Bl. 263. But the doctrine of the avulsion of the seal in executory contracts was relaxed at an earlier period than in the case of rasures, etc., it having been long admitted that the validity of the instrument is not affected if it appears, or there is reason to presume, that the seal was torn off by accident, or by a stranger, or was destroyed by time. 2 Min. Insts. 741; 2 Bl. Com. 308, note (21); *Sheppard's Touchst.* 70.

⁴⁵ 2 Min. Insts. 741; 2 Bl. Com. 309, note (22); *Doe v. Bingham*, 4 B. & Ald. 672; *Roe v. Archbishop of York*, 6 East, 86; *Bolton v. Bishop of Carlisle*, 2 H. Bl. 263; *Grayson v. Richards*, 10 Leigh (Va.) 57.

⁴⁶ *Commonwealth v. Dudley*, 10 Mass. 403. See 3 Washburn, Real Prop. (6th Ed.) § 2182.

⁴⁷ 2 Min. Insts. 741; 2 Bl. Com. 308; *Sheppard's Touchst.* 70.

§ 962. **IV. Disclaimer of Title by Grantee.** Where the conveyance is by deed indented, as the grantee by executing the deed accepts the estate, he cannot afterwards disclaim, although, of course, he may reconvey it. But in case of a deed poll it is said that, although the estate conveyed passes to the grantee independently of his assent, so that, if he does not choose to accept it, he must formally disclaim the title, yet he is not estopped so to do.⁴⁸

The distinction, above adverted to, between disclaiming the title, whereby the effect of the conveyance is avoided, and reconveying the estate, which recognizes the previous conveyance as good and effectual, is sometimes of great practical importance; as, for example, where a condition or covenant is annexed to the grant. In that case, as we have seen, by accepting the estate, the grantee becomes personally obliged to perform the condition or covenant, notwithstanding the burden may exceed the benefit,⁴⁹ so that, in case of a reconveyance, the obligation, if third persons were concerned in it, would still remain, whilst in case of a disclaimer, the effect of the original deed being annulled, the grantee would be exonerated from all responsibility.⁵⁰

§ 963. **V. Effect of Disagreement of Persons Whose Concurrence is Necessary.** Thus, at common law, if a husband, where a feme covert is concerned, or the wife herself after the coverture is ended, disagrees to the conveyance, it is thereby avoided.⁵¹ In this country, however, in those states that have enacted statutes converting all the wife's property into her separate estate, this is no longer the law, but the wife only has such right to disagree to the conveyance as if she were unmarried, and the husband has no right at all to disagree to it on her behalf.

So, if an infant, a lunatic or a person under duress, when these disabilities are removed, disagree to a conveyance, it is thereby avoided.⁵²

⁴⁸ 2 Min. Insts. 741.

⁴⁹ Ante, § 377.

⁵⁰ 2 Min. Insts. 741, 742.

⁵¹ 2 Min. Insts. 742; 2 Bl. Com. 309.

⁵² Ante, § 871; 2 Min. Insts. 656, 742; 2 Bl. Com. 309.

CHAPTER XXXIX.

TITLE BY CONVEYANCE CONTINUED—III. THE SEVERAL SPECIES OF CONVEYANCE.

- § 964. Outline of Discussion.
- 965. Original or Primary Conveyances at Common Law.
 - I. Feoffment.
 - 966. II. Gift.
 - 967. III. Lease.
 - 968. IV. Grant.
 - 969. V. Exchange.
 - 970. VI. Partition.
- 971. Derivative or Secondary Common Law Conveyances.
 - I. Release.
 - 972. Several Ways in Which a Release may Enure or Operate—
 - 973. Enumeration.
 - 974. 1. Release Enuring by Way of Passing a Right.
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 - 985. Doctrine of Surrender in Law.
 - 986. Effect of Surrender.
 - 987. III. Confirmation.
 - 988. Confirmation Operating to Make Sure a Voidable Estate.
 - 989. Confirmation Operating to Enlarge a Particular Estate.
 - 990. Requisites of a Confirmation.
 - 991. IV. Assignment.
 - 992. Mode of Assignment.
 - 993. What may be Assigned.
 - 994. Rights and Liabilities Arising out of the Assignment of a Lease.
 - 995. V. Defeasance.
- 996. Conveyances Operating under the Statute of Uses.
 - I. Conveyances Operating with Actual Transmutation of the Possession.
 - 997. II. Conveyances Operating under the Statute of Uses without Actual Transmutation of Possession.
 - 998. 1. Conveyances Operating as a Bargain and Sale.
 - 999. 2. Conveyance Operating as a Covenant to Stand Seised.
 - 1000. 3. Conveyance by Lease and Release.
 - 1001. Conveyances Operating under State Statutes.

§ 964. Outline of Discussion. Having in the preceding chapter explained the general nature of deeds, and more particularly of

deeds of conveyance of landed property, we are now to consider the several species of conveyances of lands, together with their respective incidents, of all of which species of conveyances the deed is the common instrument—by usage at common law and by positive requirement under the English statute of frauds and the various statutes of conveyances.

The main division of conveyances is into (1) conveyances operating at common law; and (2) conveyances operating under statutes. Common-law conveyances are in turn divided into original or primary conveyances, by means whereof the benefit or estate is created or first arises, not necessarily supposing any other previous transaction touching the property transferred, and derivative or secondary conveyances, whereby a benefit or estate previously created is enlarged, restrained, transferred or extinguished.

The original or primary common-law conveyances are (1) feoffment; (2) gift; (3) lease; (4) grant; (5) exchange; and (6) partition.

The derivative or secondary common-law conveyances are (1) release; (2) surrender; (3) confirmation; (4) assignment; and (5) defeasance.

The statutory conveyances, or conveyances operating under statutes, are (1) those taking effect by way of use under the statutes of uses, which embrace conveyances operating with actual transmutation of the possession, such as a feoffment, fine or recovery to A. to the use of B., and also those operating without transmutation of the possession, including (a) conveyances by way of bargain and sale, (b) conveyances by way of covenant to stand seised, and (c) conveyances by way of lease and release; and (2) conveyances operating under state statutes.

In tabulated form, these various forms of conveyance, which will be discussed seriatim in the following sections, appear as follows:

I. Common-Law Conveyances.

A. Original or Primary Conveyances.

1. Feoffment.
2. Gift.
3. Lease.
4. Grant.
5. Exchange.
6. Partition.

B. Derivative or Secondary Conveyances.

1. Release.
2. Surrender.
3. Confirmation.
4. Assignment.
5. Defeasance.

II. Statutory Conveyances.

A. Conveyances Operating under the Statute of Uses.

1. Conveyances Operating with Actual Transmutation of Possession.

2. Conveyances Operating without Actual Transmutation of Possession.

a. Conveyances by Bargain and Sale.

b. Conveyances by Covenant to Stand Seised.

c. Conveyances by Lease and Release.

B. Conveyances Operating under State Statutes.

§ 965. **Original or Primary Conveyances at Common Law—I. Feoffment.** A feoffment is derived from the verb to enfeoff, feoffare, or infeudare, to give one a feud; and therefore feoffment is properly *donatio feudi*. It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered by the public, and proved. It is applied to corporeal property alone, and as Lord Coke says "properly betokeneth a conveyance in fee," although it is sometimes improperly used with reference to estates of freehold merely, as for life. He that so gives, or enfeoffs, is called the feoffor, and the person enfeoffed is denominated the feoffee.¹

The common law required no deed nor writing in order to constitute an effectual feoffment. Such a requirement would have been ill-suited to so illiterate a population as composed the Saxon and Norman communities; nor was it made until so recently as the statute of frauds, etc., 29 Car. II, c. 3, §§ 1, 2, 3, (A. D. 1678), in England, to which the statutes of conveyances with us correspond.²

But mere words, whether contained in a deed or expressed orally, do not suffice, at common law, to perfect the feoffment. There remains to be performed the indispensable ceremony of livery of seisin, without which the feoffee has but a mere estate at will. The word "seisin" imports the possession of a freehold, and the phrase "livery of seisin" signifies the actual delivery by the feoffor to the feoffee of the corporeal possession of the freehold of lands or tenements, which was held absolutely necessary to complete the donation; so that livery of seisin is no other than the pure feudal investiture or delivery to the grantee of the corporeal possession of the lands.³

Although the feoffor may have no lawful estate in the premises, or a less one than the feoffment accompanying the livery specifies and purports to pass, yet such solemnity and importance is attach-

¹ 2 Min. Insts. 744; 2 Th. Co. Lit. 332, 353; 1 Th. Co. Lit. 622; 2 Bl. Com. 309.

² 2 Min. Insts. 745.

³ Ante, § 133 et seq.

ed by the common law to the ceremony of livery, that supposing the grantor to be in possession, the full compass of the estate designated passes, liable to be divested by action only, and not by entry. Hence wrongful conveyances thus sanctioned by livery are known as tortious conveyances, because they are liable to be in this manner perverted so as to work a tort or wrong to the true owner.⁴

§ 966. **II. Gift.** The conveyance by gift (*donatio*) is properly applied to the creation of an estate tail, as feoffment is to that of a fee simple, and lease to that of an estate for life or for years. It differs in nothing from a feoffment but in the nature of the estate passing by it; for the operative words are the same, namely, "do" or "dedi"; and gifts in tail, like all estates of freehold, are equally imperfect without livery of seisin as are feoffments in fee simple. And this is the only distinction which Littleton seems to take when he says: ⁵ "It is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee," namely, as he explains, that feoffor is applied to a feoffment in fee simple, donor to a gift in tail, and lessor to a lease for life or for years, or at will. In common acceptance, gifts are not unfrequently confounded with grants, presently to be mentioned.⁶

§ 967. **III. Lease.** A lease is a conveyance of lands or tenements (usually in consideration of a rent or other annual or periodical recompense) for life, for years or at will, but always for a less time than the lessor hath in the premises; for if it be for the grantor's whole interest, supposing the grantor to have an estate for life or years, it is more properly an assignment (one of the secondary conveyances) than a lease.⁷

The subject of leases has been fully discussed heretofore in treating of estates for years.⁸

§ 968. **IV. Grant.** A grant is the regular method, by the common law, of transferring the property of incorporeal hereditaments, or of things whereof, from their nature, livery cannot be had. For which reason, as all corporeal hereditaments, such as lands and houses, are at common law said to lie in livery, so the others, as commons, rents, ways, franchises, remainders, reversions, etc., are said to lie in grant. The operative technical words of a grant, are "dedi et concessi," hath given and granted; but any other words that show the intention of the parties will have the same effect,

⁴Ante, § 196.

⁵1 Th. Co. Lit. 622.

⁶2 Min. Insts. 749, 750; 2 Bl. Com. 316, 317.

⁷2 Min. Insts. 750, 751; 2 Bl. Com. 317; 2 Th. Co. Lit. 403, note (A).

⁸Ante, §§ 315 et seq., 400 et seq.

such as *alicene*, *limit* and *appoint*, *bargain* and *sell*, etc. Even where A. granted and agreed that, in consideration of a certain rent, B. should have a way over his lands, it was held to be a grant of a right of way, and not a mere covenant for enjoyment.⁹

A feoffment might at common law be made by *parol* only, the operative ceremony designed to give certainty and notoriety to the transaction being livery of seisin; but a grant required a deed always, even at common law, a deed (as livery is impossible) affording the only sufficient evidence of what was done.¹⁰

Grants need no consideration of value or of blood to give them effect as between the parties; and, when made applicable to the transfer of land (as they have been by statute), they may for that reason be effectual in creating ulterior limitations to persons not in being or not ascertained, which might fail if they were created by bargain and sale or covenant to stand seised, as being outside of the considerations which ought to support them.¹¹

At common law, as we have seen, no freehold estate in corporeal property can be created to commence in futuro for two reasons: (1) That the freehold can pass only by livery of seisin, which is incompatible with any but an immediate estate in presenti; (2) that if it were allowed, there would be no one to perform meanwhile the feudal services, or if need were, to sue or be sued for the subject. That this last reason of policy was the more operative is demonstrated by the fact that a grant of a freehold estate in rents, or other incorporeal hereditaments, already in esse, or created, to commence in futuro, is void at common law, although, of course, no livery is required or is possible, whilst an original grant of a freehold estate in a rent, etc., created *de novo*, may be made to begin in futuro, for no stranger can have occasion to sue, nor any one to be sued, for any rent, etc., thus newly created.¹²

The operation of a grant at common law is materially different from that of a feoffment; for, as we have seen, a feoffment by force of the livery operates immediately upon the possession, without regard to the actual estate or interest of the feoffor, but a grant only operates on the estate of the grantor, and will pass no more than the grantor is by law enabled to convey. Hence a grant, though tortious, can never operate to produce a forfeiture, as a feoffment does. This rule is conjectured to have arisen from the

⁹ 2 Min. Insts. 777, 778; 2 Bl. Com. 317; *Holmes v. Sellers*, 3 Lev. 305.

¹⁰ 2 Min. Insts. 778; 2 Th. Co. Lit. 356. But a grant—that is, a deed—is just as necessary for the transfer of an estate for years in an incorporeal hereditament as it is for a freehold.

¹¹ 2 Min. Insts. 778.

¹² 2 Min. Insts. 778, 779.

circumstance that, a grant being always by deed, the grantee's estate might be known by inspection of the deed, and so it was not needful, in order to protect the interests of purchasers, to regard more as passing than the grantor possessed and could really give. However, another reason, at least as satisfactory, is suggested by Gilbert, C. B., namely, that a grant is a secret conveyance, and ought not to be allowed the same extensive operation as a feoffment, with its notorious livery of seisin.¹³

§ 969. **V. Exchange.** This term does not signify mere reciprocal conveyances. An exchange is a single conveyance, containing a mutual grant of equal interests in lands, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case that the conveyance without it cannot operate as an exchange. It can be supplied by no other word, nor expressed by any circumlocution. The estates exchanged must be equal in quantity—not of value, for that is immaterial, but of interest, as fee simple for fee simple, life estate for life estate, and lease for years for lease for years, and the like; and in this aspect an estate in joint tenancy is esteemed equal to, and is, therefore, exchangeable with, a tenancy in common. The exchange may be of things that lie either in grant or in livery, and they may be exchanged, the one kind for the other. But even in the exchange of freeholds in corporeal property, no livery of seisin is necessary to perfect the conveyance. Entry, however, must be made on both sides; for if either party die before entry the exchange is void for want of sufficient notoriety, except that if one has entered, he shall not first begin to avoid the transaction. There is incident to an exchange, tacitly implied in the word, a condition and a warranty. By virtue of the condition, if either party be evicted from any part of the land he receives by defect of the other's title, he may re-enter upon his own land and avoid the exchange in toto. And by virtue of the warranty (which is an ancient warranty, and not a modern covenant of title), upon a like eviction, he may vouch and recover over of the other party so much of his own land (the warranty applies to no other) as is equal in value to what he has lost.¹⁴

Lord Coke enumerates five elements as necessary at common law to the perfection of an exchange, namely:¹⁵

- (1) That the estates given be equal;
- (2) That the word *escambium*, exchange, be used;

¹³ 2 Min. Insts. 779; Gilbert, Ten. 122; 2 Th. Co. Lit. 402, note (Q, 1).

¹⁴ 2 Min. Insts. 781; 2 Bl. Com. 323; 2 Th. Co. Lit. 448, note (G).

¹⁵ 2 Th. Co. Lit. 446; 2 Min. Insts. 781.

(3) That there be an execution by entry or claim in the life of the parties;

(4) That if it be of things that lie in grant, it must be by deed indented;

(5) That if the lands be in several counties, there ought to be a deed indented; or if the things lie in grant, albeit they be in one county.

It is to be observed that there can be but two distinct parties to an exchange as intimated by Littleton;¹⁶ but there may be any number of persons, so they constitute only two parties in interest. Thus, as we have seen, two or more joint tenants may exchange with two or more tenants in common,¹⁷ or a wife may unite with her husband on one side to exchange lands with another person or persons on the other. And if the deed of exchange omits the name of the grantee of one of the parcels of land, the court may supply the omission and give effect to the deed, if, on inspection of the deed, enough shall appear to show in whom the title to that parcel vested.¹⁸

§ 970. VI. Partition. At common law, as between joint tenants and tenants in common, a partition is a conveyance, and in the case of joint tenants must, at common law, be evidenced by a deed; livery of seisin being as to them mutually impracticable. In the case of tenants in common, it must be evidenced by livery of seisin, in case of freehold. If the estate be less than freehold, it is believed that tenants in common may make partition by parol.¹⁹

But by the English statute of frauds, 29 Car. II, c. 3, §§ 1, 2, 3, if the estate to be partitioned is for more than three years, it must be by deed or writing; and in the United States it is regulated by the statutes of conveyances.

As between coparceners, however, a partition is not at common law deemed a conveyance at all, for it is said it makes no degree in deducing title, since the partition between coparceners was at common law compulsory, and therefore might be made by parol and without livery on either side.²⁰

§ 971. Derivative or Secondary Common-Law Conveyances. Secondary or derivative conveyances are so called, as we have seen, because they suppose some prior transaction touching the same subject between the same parties, or by one of them, or, as Blackstone says, presuppose some other conveyance precedent, and only

¹⁶ 2 Th. Co. Lit. 446; 2 Min. Insts. 782.

¹⁷ 2 Min. Insts. 782; 2 Th. Co. Lit. 447, note (8).

¹⁸ *Lagorio v. Dozier*, 91 Va. 503, 504, 22 S. E. 239.

¹⁹ 2 Bl. Com. 324.

²⁰ 2 Min. Insts. 783.

serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance.²¹

The derivative or secondary conveyances are: (1) Release; (2) surrender; (3) confirmation; (4) assignment; (5) defeasance.

§ 972. **I. Release.** A release, in the most general sense, is the discharge of a man's right, whether it be of his right to actions, personal, real, or mixed, or of the right he has in lands or tenements. "Releases," says Littleton, "are in divers manners, viz.: Releases of all right which a man hath in lands or tenements, and releases of actions, personal and real, and other things."²²

It is with releases in the former of Littleton's senses, namely, as a mode of conveyance of rights in lands or tenements, that we have now to do. In this sense, a release is defined to be a discharge or a conveyance of a man's right in lands or tenements to another that hath some former estate therein.²³

Brief as is Littleton's treatise on Tenures, he illustrates the nature of the release by a form:

"Releases of all the rights which men have in lands or tenements, etc., are commonly made in this form or to this effect:

"Know all men by these presents, that I, A. of B., have remised, released, and altogether from me quitclaimed to C. of D., all the right, title, and claim which I have, or by any means may have, of and in one messuage, with the appurtenances, in F.," etc.

Upon which Coke's comment is: "Here Littleton sheweth precedents of releases of right; and precedents doth both teach and illustrate, and therefore our student is to be well stored with precedents of all kinds."²⁴

§ 973. **Same—Several Ways in Which a Release may Enure or Operate—Enumeration.** Releases, as conveyances of land, or transfers or discharges of rights therein, in respect to their operation, are divided at common law into four several sorts, viz.: (1) Releases that enure by way of passing a right—*de mitter le droit*; (2) releases that enure by way of passing an estate—*de mitter l'estate*; (3) releases that enure by way of enlarging an estate—*d'enlargir l'estate*; and (4) releases that enure by way of extinguishing a right—*d'extinguisher le droit*;²⁵ to which may be added (5) a more modern kind, known as a quitclaim deed.²⁶

²¹ 2 Bl. Com. 324 et seq.; ante, § 964.

²² 2 Th. Co. Lit. 451; 2 Min. Insts. 783.

²³ 2 Min. Insts. 783; 2 Bl. Com. 324.

²⁴ 2 Th. Co. Lit. 452; 2 Min. Insts. 784.

²⁵ 2 Min. Insts. 784; 2 Bl. Com. 324, 325; 2 Th. Co. Lit. 451, note (A), 459 et seq.

²⁶ Post, § 978.

§ 974. Same—1. Release Enuring by Way of Passing a Right.

Releases are said to enure by way of passing a right (*de mitter le droit*), where nothing but the bare right passes, of which the most frequent instance is that of disseisee to disseisor. In a release of this kind no words of limitation are requisite, even at common law; for if made for a day, or an hour, it is as strong as if made to the releasee and his heirs forever. But it is indispensable that the releasee should be in possession, either of the land, or of a reversion or remainder therein; and that not of a term of years, but of a freehold, albeit it be a wrongful one, as in case of the disseisor. The lessee for years is only the bailiff of the freeholder, on whom the entry and action must be, and the latter only therefore is capable of receiving a release of the right.²⁷ But no privity is requisite for such a release, as it is in case of a release enuring by way of enlargement.²⁸ Hence a disseisee may release his outstanding right to the disseisor's tenant for life.²⁹

The common law requires that the releasee should have possession of the land, or at least of an undivested right therein, by way of reversion or remainder, in conformity with that ancient maxim of the law which forbids a right of entry, or a chose in action, to be granted or transferred to a stranger, whereby, says Lord Coke, "is avoided great oppression, injury, and injustice."³⁰

§ 975. Same—2. Release Enuring by Way of Passing an Estate.

When two or more persons become seised of the same estate by a joint title, either by contract or descent, as joint tenants or coparceners, and one of them releases his right to the other, such release is said to enure by way *de mitter l'estate*, of passing an estate; for where two several persons come in by the same feudal contract, one of them may discharge to the other the benefit of such contract by a release, because no notoriety is needful, for there was a sufficient notoriety in the prior feudal contract. Thus, two coparceners come into one entire feud descending from their ancestor, and therefore they may release privately to each other without any notoriety, because they take by the former descent, which established them in possession. But since coparceners do also transmit distinct estates to their children, they may also pass their estates by distinct feoffments. But joint tenants can only pass their es-

²⁷ 2 Min. Insts. 784, 785; 2 Th. Co. Lit. 459 et seq., note (W); Gilbert, Ten. 54.

²⁸ Post, § 976. And of course no livery of seisin is required, since the releasor is not in possession.

²⁹ 2 Th. Co. Lit. 464, 465; 2 Min. Insts. 785.

³⁰ 2 Th. Co. Lit. 464, 113, note (K, 3).

tates to one another by release, for they all come in by the first feudal contract; and therefore a second feoffment cannot give any further title or notoriety, because every person is supposed to be in by his elder title, which, in the case of joint tenants, is the original feoffment, so that a second feoffment would be useless. In releases that enure by way of passing an estate, privity of estate, as already explained, is necessarily supposed; but words of inheritance are not necessary, for the parties are not in by the release, but by the original feudal contract, which passes an inheritance to all of them, and the release only discharges the right of one of them.³¹

One tenant in common cannot release to his companion, because they have distinct freeholds, but they must, at common law, pass their estates by feoffment and livery of seisin; for as their estates were, or may have been, created by different acts and different liveries, they must also convey to each other by distinct liveries.³²

§ 976. **Same—3. Release Enuring by Way of Enlarging an Estate.** Releases enure by way of enlargement of an estate when the possession and inheritance are separated for a particular time; and he who has the reversion and inheritance releases all his right and interest in the lands to the person who has the particular estate. Such releases are said to enure by way of enlargement, and to be equal to an entry and feoffment, and to amount to a grant and attornment, and no livery is possible, at least if the releasee already have a freehold estate.³³

That a release may operate by way of enlargement, at common law, three circumstances are requisite: (1) That the releasee should have a vested estate in possession; (2) that the releasor should have a vested estate in reversion or remainder, expectant mediately or immediately, upon the estate of the releasee; (3) that there should be a privity of estate between the releasor and the releasee.³⁴

The instances of such releases show that it is not sufficient that the releasee should have a mere inchoate executory interest, as an *interesse termini*, or a contingent remainder, or any other executory and contingent interest, nor that he should have a mere right or title of entry, as a lessee for life, after he has been disseised, or a lessee for years, after he has been ousted, and while his interest remains a mere right or title of entry. But a release may be made to

³¹ 2 Min. Insts. 786; Gilbert, Ten. 72 et seq.; 2 Th. Co. Lit. 514, note (T, 3).

³² 2 Min. Insts. 786; Gilbert, Ten. 74.

³³ 2 Min. Insts. 787; 2 Th. Co. Lit. 499, note (Z, 2).

³⁴ 2 Min. Insts. 787; 2 Th. Co. Lit. 499, note (Z, 2).

a tenant at will or by elegit, or to a lessee after he has made an underlease for years; but not to a tenant by sufferance, nor to a trespasser in possession.³⁵

There must subsist, between releasor and releasee, the relation of lessor and lessee, or of particular tenant and remainderman or reversioner, so that there may be a privity of tenure between them. And for the purpose of this doctrine the assignee or representative of the lessee stands in the place of the lessee; and the assignee or representative, whether heir or devisee, of the reversioner, stands in the place of the reversioner; and the ability of making, and capacity of receiving, such enlargement by release continues, although the lessee, etc., or his assignee, create a particular estate derived out of his own estate; and although the reversioner create a particular estate, which is interposed between the interest of the particular tenant and the reversion; for, notwithstanding such particular estates, there is a continuing privity between the lessee or his assignee, on the one hand, and the reversioner or remainderman, or his assignee, on the other. But it should be observed that an estate created out of a particular estate is not, during such particular estate, capable of enlargement by release of the remainder or reversion expectant on such particular estate, because in such case there is no privity. The material rule applicable to the subject seems to be that the particular estate, the remainder or remainders, and the reversion, are all parts of the same estate.³⁶

Releases which operate by enlargement of estate require, at common law, the same technical words of limitation as feoffments or grants.³⁷

§ 977. Same—4. Release Enuring by Way of Extinguishment.

A release enures by way of extinguishing a right where it destroys the right, instead of passing anything to the releasee. It operates thus because, for some reason, it cannot in law operate to pass what it purports to release, and it is therefore construed, according to the maxim, "*Ut res valeat magis quam pereat*," to extinguish the right which it cannot transfer.³⁸

Thus, if a tenant for life is disseised, and the lessor releases the reversion to him in fee, the release cannot at common law pass the reversion, because the releasee is not in possession; but *ut res valeat*, it operates to extinguish it and the rent along with it.³⁹

³⁵ 2 Min. Insts. 787; 2 Th. Co. Lit. 499, note (Z, 2), 503 et seq.

³⁶ 2 Min. Insts. 787, 788; 2 Th. Co. Lit. 499, note (Z, 2); 2 Bl. Com. 164.

³⁷ 2 Min. Insts. 788.

³⁸ 2 Min. Insts. 788.

³⁹ 2 Min. Insts. 788; 2 Th. Co. Lit. 389 et seq., 493, note (R, 2). So, also, where a landlord releases the rent to his tenant, the latter cannot at once

A married woman's release of her contingent dower interest by uniting in her husband's deed or contract to convey,⁴⁰ or the release of a contingent remainder by the remainderman to one in possession,⁴¹ are instances of this sort of release; and so is the release of a power of appointment.⁴²

§ 978. **Same—5. Quitclaim Deed.** The quitclaim deed, as used in this country, is a development of the common-law release, having acquired its name from one of the words commonly used in such instruments.⁴³ It is used sometimes in cases where the common-law release would operate by way of enlarging the estate, and sometimes where such release would enure by way of passing a right.

The quitclaim deed purports to convey merely whatever title to the land the grantor may have, and its use excludes any implication that he has a good title, or, indeed, any title at all.⁴⁴

Hence it contains no covenants of title, and in Virginia, as in some of the other states, its employment is deemed in itself notice to the purchaser of a possibly defective title, and puts him upon inquiry, so that he cannot claim to occupy the position of a bona fide purchaser,⁴⁵ though the better view seems to be that this conclusion is not justified by the purpose of the language of the quitclaim deed.⁴⁶

The quitclaim deed has an advantage over the common-law release in that it is not necessary for the former that the grantee be in possession.⁴⁷

both pay and receive it, and so the release can pass nothing, but it extinguishes the rent. 2 Min. Insts. 788.

⁴⁰Ante, § 283.

⁴¹Ante, § 658.

⁴²Post, § 1061.

⁴³Ante, § 972.

⁴⁴2 Tiffany, Real Prop. § 377; City and County of San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Garrett v. Christopher, 74 Tex. 453, 12 S. W. 67, 15 Am. St. Rep. 850; Kerr v. Freeman, 33 Miss. 292.

⁴⁵Virginia & T. Coal & Iron Co. v. Fields, 94 Va. 102, 26 S. E. 426; Garrett v. Christopher, 74 Tex. 454, 12 S. W. 67, 15 Am. St. Rep. 850; Peters v. Cartier, 80 Mich. 124, 45 N. W. 73, 20 Am. St. Rep. 508; Steele v. Sioux Valley Bank, 79 Iowa, 339, 44 N. W. 564, 7 L. R. A. 524, 18 Am. St. Rep. 370; Johnson v. Williams, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243; 2 Tiffany, Real Prop. § 482.

⁴⁶2 Tiffany, Real Prop. § 482; Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350; Brown v. Banner Coal & Coal Oil Co., 97 Ill. 214, 37 Am. Rep. 105; Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316; Chapman v. Sims, 53 Miss. 154; Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192. But, even in states where the grantee in a quitclaim deed is himself charged with notice of defects, a purchaser from him for value is not so charged, for then the occurrence of one quitclaim deed in the chain of title would render

⁴⁷2 Tiffany, Real Prop. § 377; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; Kerr v. Freeman, 33 Miss. 292.

§ 979. **II. Surrender.** A surrender (*sursumredditio*), or rendering up, is of a nature directly opposite to a release; for as a release operates by the transfer or discharge of a right, usually to one in possession of the land, so a surrender is the yielding up of the possession to him who has the outstanding right. Thus, if the landlord relinquishes his reversion to his tenant for life or years, it is a release (operating by enlargement); whilst if tenant for life or years gives up his possession to the landlord, who has the reversion, it is a surrender.⁴⁸

A surrender is defined to be a yielding up of the possession of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them.⁴⁹

The proper words of a surrender are "surrender, grant, and yield up," but any form of words by which the intention of the parties is sufficiently manifested will operate as a surrender. Thus, if lessee for years "remise, release, discharge, and quitclaim" to lessor his right, title, and interest in and to the lands, or if lessee for life "leases" to lessor for lessee's life, it will amount to a surrender.⁵⁰

§ 980. **Same—Possession of Surrenderor.** The person who surrenders must be in possession. Hence a tenant for life disseised, or a tenant for years ousted, cannot surrender to his lessor before re-entry, because he has nothing but a right. So, a lessee for years who has never entered, and has, therefore, only an *interesse termini*, cannot surrender; nor can a widow entitled to dower, before her dower is assigned. An estate at will is also not surrenderable; but that seems to be because any act of surrender is regarded as being more fitly construed to be a determination of the will.⁵¹

§ 981. **Same—Estate of Surrenderee.** The person to whom the surrender is made must have a greater estate immediately in reversion or remainder, in which the estate surrendered may merge; that is, it must be in law greater, as a reversion and remainder are always deemed to be, in comparison with the particular estate. Thus, a lessee for years may surrender to him who has the re-

the title practically unmarketable. 2 Tiffany, Real Prop. § 482; *Sherwood v. Moelle* (C. C.) 36 Fed. 478, 1 L. R. A. 797; *Meikel v. Borders*, 129 Ind. 529, 29 N. E. 29; *Winkler v. Miller*, 54 Iowa, 476, 6 N. W. 698.

⁴⁸ 2 Min. Insts. 789.

⁴⁹ 2 Min. Insts. 789; 2 Bl. Com. 328; 2 Th. Co. Lit. 651.

⁵⁰ 2 Min. Insts. 789; 2 Th. Co. Lit. 551, note (A); *Smith v. Mapleback*, 1 T. R. 441; *Scott v. Scott*, 18 Grat. (Va.) 150.

⁵¹ 2 Min. Insts. 789, 790; 2 Th. Co. Lit. 554, note (D); 2 Bl. Com. 326. But the possession of a sublessee is the possession of the lessee. 2 Min. Insts. 790; post, § 981.

version only for years, even though the lease be for several years, and the reversioner has it for only one, or a less term still. Hence, also, before a lessee enters, having only an *interesse termini*, his surrender to the lessor is void as a surrender, not only because the lessee has no possession, as we have seen, but because the lessor has no reversion. The reversion or remainder, it will be observed, must be immediate. Thus, if A., lessee for thirty years, demise to B. for ten, B. cannot surrender to the original lessor, the owner of the fee simple, because the reversion is not immediate; but if A. surrender his lease to his lessor, the reversion of the latter being then immediate, B. may surrender to him.⁵²

§ 982. **Same—Privity of Estate between Surrenderor and Surrenderee.** A privity of estate between the parties is essential, for else there would be no immediate reversion or remainder in which the estate surrendered might merge. Thus, if tenant for thirty years make a lease for ten, and both join in a surrender to the reversioner in fee, the surrender is good for both the estates, and yet, as we have seen, the lessee for ten years could not surrender by himself, for want of privity; but when the other joins with him, his surrender shall be taken in law to precede, and that of the lessee for ten years to follow, which shall then be good.⁵³

§ 983. **Same—Doctrine as to Livery of Seisin.** Livery of seisin is not, at common law, necessary to the surrender of a freehold, nor is entry on the part of the surrenderee to the surrender of a term; for there is a privity of estate between the parties, their several interests being indeed parts of the same estate, and, livery or entry having been once made at the creation of it, there is no need of it as between the parts afterwards.⁵⁴

A surrender is perfected by the bare grant in the way of surrender; for although the assent of the surrenderee is necessary to impart mutuality to the transaction, yet that consent is presumed, as it is in all conveyances (seeing that they import a benefit), until the contrary appears.⁵⁵

§ 984. **Same—The Written Evidence of Surrender.** The common law requires no writing to make a surrender good. Like all other conveyances where an actual and visible possession may be transferred, it may be by parol. But since the statute of frauds and

⁵² 2 Min. Insts. 790; 2 Th. Co. Lit. 552, note (B), 511, note (Q, 3); 2 Bl. Com. 326.

⁵³ 2 Min. Insts. 790; 2 Th. Co. Lit. 554, note (D); 2 Plowd. 541.

⁵⁴ 2 Min. Insts. 790; 2 Th. Co. Lit. 551, note (A); 2 Bl. Com. 326.

⁵⁵ 2 Min. Insts. 790, 791; 2 Th. Co. Lit. 551, note (A); Sheppard's Touchst. 301, note (3).

perjuries in England, 29 Car. II, c. 3, §§ 1, 2, 3, and the corresponding statutes in this country the policy of having a deed or note in writing as evidence of surrenders, and also of assignments, has in all cases been insisted on. Hence the mere cancellation of a lease for life, or for a term exceeding five years, with intent ever so emphatically declared, does not operate a surrender, nor revest the land in the lessor.⁵⁶

§ 985. Same—Doctrine of Surrender in Law. A surrender may be either in deed, that is, by express words, or it may be in law. A surrender in law is where, by the legal effect of the transaction between the parties, a surrender must have been in their contemplation, and is, therefore, implied, being as Lord Coke expresses it, "wrought by consequent, by operation of law."⁵⁷

Thus, if the lessee for life or years, or the assignee of either, takes a new lease of the reversioner, whether for a greater or shorter term than before—to himself alone, or to himself and another—in the same or in another right; in short, wherever the first lease and the second cannot subsist together, there is a surrender in law of the first, for the parties, by making a contract of as high a nature for the same thing, must have tacitly consented to dissolve the former, for without the dissolution of that the lessor could not grant the interest which the second lease purports to pass and the lessee has accepted. Hence, in cases where no such incompatibility exists between the continuance of the first lease and the second transaction, but where they may stand together, there is no surrender in law. If, therefore, the lessee only license the lessor to enter upon the land in order to make a feoffment thereof, or for any specific purpose, not inconsistent with the continuance of the lease; or if the second lease be of another, and not the same thing as the first, as where the first lease is of the land, and the second of a rent or other profit out of the land; or if the second lease is not to begin until the first ends; or if the second lease is not merely voidable, but void—in all these cases there is no surrender in law.⁵⁸

⁵⁶Ante, § 957; 2 Min. Insts. 791; 2 Th. Co. Lit. 551, note (A); Grayson v. Richards, 10 Leigh (Va.) 61.

⁵⁷2 Min. Insts. 791; 2 Th. Co. Lit. 555.

⁵⁸2 Min. Insts. 791, 792; 2 Th. Co. Lit. 554 et seq., notes; Sheppard's Touchst. 301; Prestons v. McCall, 7 Grat. (Va.) 121. It is worthy of observation that a surrender in law is in some cases of greater force than a surrender in deed. Thus, an *interesse termini* may be surrendered in law, by the lessee's accepting another lease from the lessor, whilst, as we have seen, it cannot be conveyed by surrender in deed, for want of possession in the lessee and of the reversion in the lessor. 2 Th. Co. Lit. 554; 2 Min. Insts. 792.

§ 986. **Same—Effect of Surrender.** Upon surrender, there is not only a merger,⁵⁹ but all stipulations and covenants contained in the lease surrendered, must come to an end with the lease itself; and this is alike true, whether it be a surrender in law or in deed.⁶⁰

But covenants already broken are, of course, not discharged by the surrender; nor are grants of interest, or charges created by the lessee during the continuance of the lease, in any wise affected.⁶¹

§ 987. **III. Confirmation.** A confirmation is defined by Lord Coke to be a conveyance of an estate or right in esse, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased.⁶²

An instance of the first branch of the definition is, if tenant for life leaseth for forty years. Here the lease for years is voidable by him in reversion, in case the tenant for life should die during the term; yet if the reversioner, before the death of tenant for life, confirm the estate of the lessee for years, it is then no longer voidable, but sure. The latter branch, or that which tends to the increase of a particular estate, may be illustrated by the case of tenant for term of years, to whom the lessor confirms the land, to have for term of his life or in fee simple, whereby the term for years is enlarged, in one case, to the compass of a life estate, and in the other of a fee simple.⁶³

The proper words of confirmation are "give, grant, ratify, approve, and confirm"; but any words which plainly manifest the intent will suffice.⁶⁴

The modes whereby a confirmation enures or operates are: (1) To make sure a voidable estate; and (2) to enlarge a particular estate, in which latter respect its effect is similar to that of a release.⁶⁵

§ 988. **Same—Confirmation Operating to Make Sure a Voidable Estate.** A confirmation, being an approbation of, or assent to, an estate already created, by which the confirmor, as far as it is in his power, strengthens and makes it valid, it is manifest that it can have this operation only with respect to estates voidable or

⁵⁹Ante, §§ 333, 665, et seq.; 2 Min. Insts. 428 et seq., 792.

⁶⁰2 Min. Insts. 792; *Prestons v. McCall*, 7 Grat. (Va.) 121.

⁶¹2 Min. Insts. 792; *Sheppard's Touchst.* 301.

⁶²2 Th. Co. Lit. 516; 2 Bl. Com. 325; 2 Min. Insts. 792.

⁶³2 Min. Insts. 793; 2 Bl. Com. 325, 326; 2 Th. Co. Lit. 538.

⁶⁴2 Min. Insts. 793; 2 Bl. Com. 325; 2 Th. Co. Lit. 517.

⁶⁵Ante, § 976.

defeasible, and can have no effect on estates which are absolutely void. "A confirmation," says Coke, "doth not strengthen a void estate; for a confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void in law."⁶⁶

For a confirmation operating to make sure a voidable estate, no privity is necessary as it is in the case of a release (or confirmation), enuring by way of enlargement. Hence, if my tenant for life makes a lease for years, although I cannot release to the lessee for years for want of privity, yet I may confirm his estate, so as to make it unavoidable. So I cannot release to the termor of my disseisor, because there is no privity between us, but only a bare right; but I may confirm the termor's existing estate. Confirmation requires no words of limitation, such as heirs; for if the confirmee's estate be made sure, even for a minute, it can never be defeated by the confirmor, whilst, without words of limitation, a release, at common law, enlarges the releasee's interest merely to a life estate.⁶⁷

§ 989. Same—Confirmation Operating to Enlarge a Particular Estate. The enuring of a confirmation to enlarge a particular estate is, as Gilbert, C. B., observes, foreign to its business and purpose, and is, indeed, due to the special words employed, and not to the nature of the conveyance. So far as it thus operates, a confirmation differs little from a release enuring by way of enlargement, and, like that, requires (1) that the confirmee should have a vested estate in possession, and not a mere right; (2) that the confirmor should have a vested estate in reversion or remainder, expectant mediately or immediately on the estate of the confirmee; and (3) that there should be a privity of estate between the confirmor and confirmee.⁶⁸

§ 990. Same—Requisites of a Confirmation. For a valid confirmation, it is essential that there be: (1) A precedent estate in the confirmee, rightful or wrongful, in his own or in another's right; (2) in the confirmor an estate of his own, out of which the confirmation may enure; and (3) a deed.

⁶⁶ 2 Th. Co. Lit. 516, note (A); 2 Min. Insts. 793. This operation of a confirmation (namely, to make sure a voidable estate) is the proper work of such a conveyance. If it goes to enlarge the confirmee's estate, it is by force of the words of enlargement which are employed, and is foreign to its proper business and object. Gilbert, Ten. 75; 2 Th. Co. Lit. 516, note (A); 2 Min. Insts. 793.

⁶⁷ 2 Min. Insts. 793, 794; Gilbert, Ten. 75 et seq.; 2 Th. Co. Lit. 521 et seq.

⁶⁸ Gilbert, Ten. 75; 2 Min. Insts. 794; 2 Bl. Com. 326; 2 Th. Co. Lit. 399, note (Z, 2). See ante, § 976. No livery is necessary at common law, nor indeed possible, if the confirmee is already in possession of a freehold estate.

In regard to the latter, it seems always to have been necessary, even at common law, that a confirmation should be evidenced by deed, there being no visible and notorious change of possession accompanying it.⁶⁹

§ 991. **IV. Assignment.** An assignment, in a general sense, is a transfer, or making over to another, of the right one has in any estate or property; but, in the sense of a conveyance of lands or tenements, it is usually applied to an estate for life or years. It differs from a lease only in this: That by a lease one grants an interest less than his own, reserving to himself a reversion; in an assignment he parts with the whole property, and the assignee stands for many purposes in the place of the assignor.⁷⁰

The proper words of assignment are "assign, transfer, and set over," but not to the exclusion of any other language that plainly expresses the idea. Thus, if one leases the land to another for his entire term, reserving a rent, or if he underlets, it is an assignment, and not an underlease, although a rent be reserved.⁷¹

All that is essential to make a good assignment is the intention to place the beneficiary exactly in the place of the assignor. If his terms of holding are different, as at an increased rent, though the whole estate is transferred, it is not an assignment, but an underlease.⁷²

§ 992. **Same—Mode of Assignment.** At common law, an assignment of a lease, whether for life or years, may be made by parol only, although, if it were for life, it must be accompanied (as the transfer of every freehold in lands must be) by livery of seisin. But since the statute of frauds and perjuries, 29 Car. II, c. 3, §§ 1, 2, 3, the policy has been to require it to be, in all cases (in pursuance of section 3), even where the interest assigned does not exceed three years, by deed or writing.⁷³

There needs no valuable consideration to support an assignment, the liabilities incident to the lease, as to pay rent, etc., which the assignee assumes, being always sufficient.⁷⁴

§ 993. **Same—What may be Assigned.** An assignment, as a specific mode of conveyance, is properly applicable, it will be re-

⁶⁹ 2 Min. Insts. 794. The deed is always necessary at common law in cases where no livery of seisin can be given. Ante, § 132.

⁷⁰ 2 Min. Insts. 795; 2 Bl. Com. 326, 327.

⁷¹ 2 Min. Insts. 795; 2 Th. Co. Lit. 566, note (S); *Palmer v. Edwards*, 1 Dougl. 187, note; *Scott v. Scott*, 18 Grat. (Va.) 159 et seq., 177 et seq.

⁷² *Dunlap v. Bullard*, 131 Mass. 161; *Post v. Kearney*, 2 N. Y. 394, 51 Am. Dec. 303; *Collamer v. Kelley*, 12 Iowa, 319.

⁷³ 2 Min. Insts. 795.

⁷⁴ 2 Min. Insts. 795; 2 Th. Co. Lit. 566, note (S).

membered, only to the transfer of the lessee's whole estate, when such estate is for life or years.⁷⁵

It is often used, however, in a more general sense, to signify the transfer of any estate or interest whatever in real property; and as the general principles which regulate the transaction in its more comprehensive signification are the same as those which govern it in its more limited and proper sense, there will be no need in stating those principles to discriminate between the two senses. The doctrine is that every estate and interest in lands and tenements, and every present and certain estate or interest in incorporeal hereditaments, such as rents, ways, franchises, etc., may be assigned, so that if, in leases for life or years, it is intended to restrict or bar the power of assignment, it must be done by special and precise stipulations. Even though the interest be future, as a term for years to commence at a subsequent period, it may be assigned; for it is vested in *præsenti*, though it is to take effect in enjoyment only in *futuro*.⁷⁶

But no right of entry or of action can be assigned at common law, so that if one is disseised, and assigns his right to another before he has entered on and dispossessed the disseisor, the assignment is void, which Coke explains to be "for avoiding of maintenance, suppression of right, and stirring up of suits."⁷⁷ But even at common law, although the assignment of such interests does not pass the legal title, yet it creates an equitable ownership which the Court of Chancery protects, and to which it gives effect.⁷⁸

A distinction must be noted, in respect to assignability, between a naked power or license, which is not capable of being assigned, and a power or license coupled with an interest, which may be. Thus, if a stranger has authority to cut and sell timber trees from certain lands, he cannot assign the authority; but if a lessee of the land has such power conferred upon him, by assigning the lease, he may pass the power with it.⁷⁹

§ 994. Same—Rights and Liabilities Arising out of the Assignment of a Lease. These rights and liabilities depend, for the most part, upon the stipulations and conditions, express and implied, contained in the lease; and in general, forasmuch as they arise as incident to the assignment, they cease and determine when the assignee's possession ceases under the assignment. Thus, if he assigns over his interest and parts with the possession, he is no longer

⁷⁵Ante, § 991.

⁷⁶2 Min. Insts. 796.

⁷⁷2 Th. Co. Lit. 566, note (S), 85; ante, § 477; 2 Min. Insts. 796.

⁷⁸2 Min. Insts. 796. See ante, § 477.

⁷⁹Ante, § 125; post, § 1047; 2 Min. Insts. 796.

answerable for any rent which may accrue afterwards, nor for the breach of any of the agreements contained in the lease; not even though he should assign to a beggar, nor though the person to whom he assigns neither takes actual possession, nor receives the lease.⁸⁰

The rights and liabilities arising upon an assignment have been fully discussed elsewhere,⁸¹ and the discussion need not be repeated. Suffice it to say that the general doctrine is that, in respect to the lessor and his representatives, the assignee of the land may have the benefit of, and is chargeable with, all the covenants contained in the lease which run with the land, and are broken during the continuance of his interest. But at common law the assignee of the reversion is neither liable upon any express covenants contained in the lease, nor is entitled to the benefit there- of, either as against the lessee, or his assignee—a doctrine which it has been found needful materially to modify by statute.⁸²

§ 995. **V. Defeasance.** A defeasance is a collateral deed, made at the same time with a feoffment, or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated. And in this manner mortgages were formerly made, the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a specified time. And this, when executed at the same time with the original feoffment, was considered as part of it, and therefore only indulged; no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity, though when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things merely executory, or to be completed by matter subsequent, as rents, annuities, covenants, promises, and the like, were always liable to be recalled by defeasances, made subsequent to the time of their creation, by the party entitled to enjoy them.⁸³

A defeasance, it will be observed, differs from a condition in being contained in a separate deed, executed at the same time with the original, whilst a condition is contained in the same deed. And this diversity has led, in a great degree, to the disuse of defeasances in practice, partly because they were often employed as a cover for

⁸⁰ 2 Min. Insts. 796, 797; 2 Th. Co. Lit. 566, note (S); 2 Rob. Pr. (2d Ed.) 102; *Staines v. Morris*, 1 Ves. & B. 11; *Taylor v. Shum*, 1 Bos. & P. 21.

⁸¹ Ante, § 374 et seq., 1131.

⁸² 31 Hen. VIII, c. 13, and 32 Hen. VIII, c. 34. See ante, § 378.

⁸³ 2 Min. Insts. 801; 2 Bl. Com. 327; 2 Th. Co. Lit. 122, 123, note (O, 3). See *Macaulay v. Smith*, 132 N. Y. 524, 30 N. E. 997.

fraud, and so became objects of suspicion, and partly from the apprehension that, as the conveyance without the defeasance was absolute, if the defeasance were lost, the proof of the condition might be difficult, if not impossible.⁸⁴

The defeasance must contain sufficient words, as that the thing shall be void in the event designated, although no particular expressions are indispensable. But it must always be by matter as high as the thing to be defeated. Hence an obligation under seal cannot be defeated or discharged by writing unsealed.⁸⁵

§ 996. Conveyances Operating under the Statute of Uses—I. Conveyances Operating with Actual Transmutation of the Possession. The student will recall that the statute of uses, 27 Hen. VIII, c. 10, in substance provides that wherever any person is seised by any ways or means whatsoever of any lands, tenements, or hereditaments to the use of another, the possession of him that is seised shall be transferred to him who has the use, for the estate he has in the use, as effectually and fully as if he had been enfeoffed of the land with livery of seisin.⁸⁶

It will likewise be remembered that conveyances operate under the statute in two ways, either with or without actual transmutation of the possession to a third party for the use of the beneficiary.⁸⁷

Conveyances which operate under the statute of uses, with actual transmutation of the possession, suppose that a conveyance operating at common law is made by the grantor to the intended trustee (as by feoffment, lease and release, fine, common recovery, etc.), accompanied by a declaration of the uses and trusts to which it is designed the trustee shall be seised. For example, a feoffment, with livery of the land, is made by the grantor, whom we may call A., to the trustee, T., and his heirs, in trust for, or to the use of (the form of the phrase is immaterial), cestui que use, C., and his heirs. The common law operates to transfer the land, by means of the feoffment and livery, to T., and then the statute takes the seisin out of him, and transfers it to C.⁸⁸

This class of conveyances is employed in England in marriage settlements, and wherever it is desired to create future uses in favor of persons not in being or not ascertained; and there is a grave

⁸⁴ 2 Min. Insts. 801; Sheppard's Touchst. 396 et seq.

⁸⁵ 2 Min. Insts. 801; 2 Th. Co. Lit. 122, note (O, 3); Cabell v. Vaughan, 1 Saund. 291, note (1); Lacy v. Kynaston, 2 Salk. 575; Sheppard's Touchst. 397.

⁸⁶ Ante, § 401; 2 Min. Insts. 804.

⁸⁷ Ante, § 401; 2 Min. Insts. 804 et seq.

⁸⁸ 2 Min. Insts. 805; ante, § 401.

doubt whether the statute applies to execute such uses when created by bargain and sale, because, it is said, *cestui que use* cannot, in the nature of things, have supplied the valuable consideration which the conveyance requires.⁸⁹

This statement resolves a question which is liable to perplex the student, namely: Why resort to a feoffment, or other common-law conveyance, to vest the land in one person, in order that the statute may take it out of him and transfer it to another? Why not at once convey it to that other? The statute must, of course, have included uses declared on such conveyances, in order to accomplish its purpose of abolishing uses altogether; but the question relates rather to the reasons which influence grantors to choose the apparently roundabout method of conveyance by feoffment to uses, instead of some more direct mode of transfer, as by simple feoffment and livery immediately to the intended beneficiary. It will be perceived that by conveying thus by feoffment, etc., to the uses declared, there is created in the feoffee, etc., what may be denominated a kind of reservoir of seisin, which will apply to (or serve, as it is termed) any future uses which are limited agreeably to law, without the embarrassment arising from the necessity that *cestui que use* should be within the consideration. Hence it is that this mode of conveyance is in England invariably used in family settlements, which often contemplate very remote limitations, and always limitations to persons not in being.⁹⁰

§ 997. II. Conveyances Operating under the Statute of Uses, without Actual Transmutation of Possession. Since, prior to the enactment of the statute of uses, a use might be raised, either by a declaration contained in or annexed to a feoffment or other conveyance transmuting the possession of the land to another person, who was then a trustee, for the uses declared, or, as it was usual to style him, feoffee to uses, or by any contract founded upon an adequate consideration, without any actual transfer of the possession, the bargainor being himself, in that case, the trustee, so, also, under 27 Hen. VIII, c. 10, which embraces all uses, howsoever created, we have a similar division.⁹¹

The adequate consideration on which a contract or covenant must be founded, in order to raise a use before the statute, as well as since, may be either, first, a consideration of value, in which case the instrument is known as a bargain and sale; or it is, secondly, a consideration of natural love and affection for the covenantor's

⁸⁹ 2 Min. Insts. 208, 805; Gilbert, Uses, 163, note (5), 398, note (2).

⁹⁰ 2 Min. Insts. 805, 806.

⁹¹ 2 Min. Insts. 806.

wife, or some near relative, when the instrument has been always designated as a covenant to stand seised. And these two exhaust the modes of raising uses prior to the statute without actual transfer of the possession, and in principle exhaust such modes under the statute. There is, however, under the statute, a third mode, according to the usual classification, whereby a bargain and sale is made for a year, and the bargainee, being thus put statutorily into possession for a year, is thereby enabled to receive a release enuring by way of enlargement;⁹² and to this the name of lease and release has been given. We are to consider, then, under the head of conveyances operating without transmutation of possession: (1) Conveyance by bargain and sale; (2) conveyance by covenant to stand seised; and (3) conveyance by lease and release.⁹³

§ 998. Same—1. Conveyances Operating as a Bargain and Sale.

A bargain and sale is a contract by which one agrees for any valuable consideration (it is not indispensable that it should be money, as Lord Chief Baron Gilbert insists) to stand seised of his lands to the use of another. At common law it might have been by words only, without writing; but by statute 27 Hen. VIII, c. 16, it was required, if it were for an estate of inheritance or of freehold, to be by deed indented and enrolled; and by the statute of frauds and perjuries, 29 Car. II, c. 3, §§ 1, 2, 3, it must be in writing, even though it relates to estates for years only, if it exceed three years.⁹⁴

By such a contract a use arises to the bargainee, to whom the statute immediately passes the legal estate and possession of the land for the estate or interest that he had in the use, without any entry, or other act on his part.⁹⁵

The proper technical words of this conveyance are "bargain and sell"; but they are by no means essential to its operation.⁹⁶ The material thing is a valuable consideration, and, therefore, if for such consideration a man, without making livery of seisin, covenant to stand seised, or gives and enfeoffs, or aliens, grants and demises, it will operate as a bargain and sale.⁹⁷

The consideration, if valuable, may be a trifling one, and the actual amount need not be stated; nor, if it be expressed in the deed, need it be actually paid, no averment or proof to the contrary

⁹² 2 Min. Insts. 787.

⁹³ 2 Min. Insts. 806.

⁹⁴ 2 Min. Insts. 806; Gilbert, Uses, 187, note (10), 95, note (5); 2 Th. Co. Lit. 578, note (B).

⁹⁵ 2 Min. Insts. 807; 2 Th. Co. Lit. 578, note (B), 461, note (Q).

⁹⁶ For form of conveyance by bargain and sale, see ante, § 890, note.

⁹⁷ 2 Min. Insts. 807; 2 Th. Co. Lit. 578, note (B); Rowlett v. Daniel, 4 Munf. (Va.) 473.

being admitted. Indeed, it seems not absolutely necessary that the consideration should be mentioned at all in the deed, as extrinsic proof of any valuable consideration not inconsistent with the deed is admissible.⁹⁸

For every conveyance under the statute of uses, there must be a use, and a seisin to serve it. Hence a person not seised (that is, not possessed of a freehold) cannot convey by bargain and sale. Thus, whilst all corporeal hereditaments, of which the bargainor has a seisin, and all incorporeal hereditaments in actual existence, may be conveyed thereby, and whilst one seised of a freehold in lands may, by bargain and sale, convey a term for years, no term for years already created can be so transferred, because the owner has no seisin, as the statute requires.⁹⁹

Contingent uses limited to a person not in esse, or not ascertained, it is said, cannot be raised by bargain and sale, because the intended cestui que use cannot provide the consideration; and it is asserted that a consideration paid by other parties, as for example, by the precedent tenant for life, would not suffice;¹ and yet it is admitted, that when there are several bargainees, as A., B., and C., a consideration furnished by any one will enure to all; nay, where the remainder is vested, a consideration paid by the particular tenant will enure to the successors. Thus, if A. agree, for a valuable consideration paid by B., to stand seised to the use of B. for life, remainder to C., the statute will execute as well the remainder to C. as the particular estate to B. It is even said that, if the consideration be paid by a stranger, it will suffice.²

A bargain and sale (like a covenant to stand seised, and a lease and a release, operating under the statute of uses), is said to be an innocent conveyance, in contradistinction to a tortious one.³ Neither of these three conveyances passes any interest but that which the seller may lawfully pass. They therefore produce no discontinuance when made by a tenant in tail, nor any forfeiture when made by a tenant for life. These conveyances, moreover, of themselves pass only a use; the legal estate and possession being transferred by the statute. Hence no use can be limited upon the estate of the bargainee, etc., so as to be executed by the statute; but the

⁹⁸Ante, § 938; 2 Min. Insts. 807; 2 Th. Co. Lit. 579, note (B), 9, note (E); Gilbert, Uses, 96, note (6), 462; Duval v. Bibb, 4 Hen. & M. (Va.) 113, 4 Am. Dec. 506.

⁹⁹2 Min. Insts. 807; Gilbert, Uses, 492; 2 Th. Co. Lit. 578, note (B).

¹2 Min. Insts. 808; Gilbert, Uses, 308, note (2), 163, note.

²2 Min. Insts. 808; Gilbert, Uses, 458, 96, note (7).

³Ante, § 196.

second use is no more than an equitable estate (as all uses were prior to the statute), under the denomination of a trust.*

When the statute of uses was enacted, its framers easily foresaw that conveyances would frequently be made by bargain and sale, being a conveyance of a private nature, not requiring the notoriety of livery; and in order to protect society against the ill consequences of such secrecy, it was enacted in the same session of Parliament, by statute 27 Hen. VIII, c. 16, that such bargains and sales should not enure to pass an estate of inheritance, or of freehold, unless they were by deed indented and enrolled, within six months from the date, in one of the courts of record at Westminster, or with the *custos rotulorum* of the county where the lands lay; and to this day this is the only general statute of registry in England.⁵

§ 999. Same—2. Conveyance Operating as Covenant to Stand Seised. A conveyance by covenant to stand seised, like that by bargain and sale, is a contract by which one agrees to stand seised of his lands to the use of another; but it differs from a bargain and sale in the fact that a deed is in all cases necessary,⁶ and also in the consideration required for it, which, instead of being valuable, is a consideration of natural love and affection for a near relative, or a wife; friendship, long acquaintance, having been school-fellows, or even love for a bastard child, not being sufficient to raise a use, and therefore not sufficient for the operation of the statute. Supposing the consideration sufficient, the covenantee, by deed, acquires the use, to which the statute transfers the corporeal possession of the land, without his ever seeing it, by a kind of parliamentary magic, as Blackstone observes.⁷

The consideration is the foundation of this conveyance, and if that exist, the words "covenant to stand seised" are not essential, but may be substituted by any words demonstrative of the intent, such as grant, bargain, sell, assign, enfeoff, etc.; nor is it needful, supposing that there is the near kindred, etc., expressly to declare the consideration.⁸

It will be observed that a covenant to stand seised can raise no

⁴ Ante, § 410; 2 Min. Insts. 216, 808; 2 Th. Co. Lit. 581, note (B).

⁵ 2 Min. Insts. 807, 808; 2 Th. Co. Lit. 579, note (B); Gilbert, Uses, 200 et seq., 520; Williams, Real Prop. 423.

⁶ 2 Min. Insts. 809; Gilbert, Uses, 243, note (4).

⁷ 2 Bl. Com. 338; 2 Min. Insts. 809; 2 Th. Co. Lit. 580, note (B); Gilbert, Uses, 456, note (4).

⁸ 2 Min. Insts. 809; 2 Bl. Com. 338, note (59); 2 Th. Co. Lit. 580, note (B); Gilbert, Uses, 251, note (2), 250, note (10); Bedell's Case, 7 Co. 40; Watts v. Cole, 2 Leigh (Va.) 662.

use in favor of strangers to the consideration; and hence, if one covenants with three persons, one of whom is his brother, to stand seised to their use, it raises a use in favor of the brother alone, and operates only to transfer the possession to him, he taking all.⁹ So no one can transfer lands by this conveyance who cannot be seised to a use, and who has not a vested estate in possession, remainder or reversion in the lands; nor can any property be transferred by it which cannot be conveyed to uses.¹⁰

§ 1000. **Same—3. Conveyance by Lease and Release.** The conveyance by lease and release consists of two parts, namely, a lease for a short period, say a year, which, when it is consummated by statutory possession in the lessee, is followed by a deed of release, which operates by way of enlargement, enlarging the lessee's estate to the full compass of the terms of the release. This was a conveyance very well known to the common law before the statute of uses, being employed hardly less frequently than feoffment; but at common law the lessee, in order to qualify himself to receive the release, was obliged actually to enter and take possession of the premises, and then only was competent to have the reversion released to him.¹¹

In lease and release, taking effect under the statute of uses, the lease is a bargain and sale for a year, whereby the possession is, by the operation of the statute, transferred to the lessee for a year, without any actual entry on his part, and thus he is prepared to receive a common-law release from the lessor, enuring to enlarge his estate to the extent of the terms of the release. Theoretically, therefore, the lease should be executed first; but it is immaterial how short a time may intervene, and in practice they are generally executed at the same meeting of the parties. It is said, indeed, that they may be contained in the same deed; nay, that the recital of the lease in the release is sufficient evidence of the lease, as against the releasor and those claiming under him, but not as to others, without proof that the lease once existed and is lost.¹²

As the lease operates as a bargain and sale under the statute of uses, whatever is requisite to a bargain and sale is necessary to it. None can convey by it who cannot be seised to a use, nor can any property be transferred by this means, which is incapable of being

⁹ 2 Min. Insts. 809; Gilbert, Uses, 246, 457, note (5); 2 Th. Co. Lit. 580, note (B).

¹⁰ 2 Min. Insts. 809; 2 Th. Co. Lit. 581, note (B).

¹¹ Ante, § 976; 2 Min. Insts. 809, 787; Gilbert, Uses, 325, 228, note (2).

¹² 2 Min. Insts. 810; Gilbert, Uses, 228, 229; 2 Th. Co. Lit. 581, note (B).

conveyed to a use; and it no more creates a discontinuance or forfeiture than does a bargain and sale, or a covenant to stand seised.¹³

The conveyance by lease and release under the statute of uses is said to have been invented by Sergeant Moore, at the request of Lord Norris, in order to prevent some of his relations from learning from the public records, or from the notorious ceremony of livery, what disposition he should make of his estate. Had he conveyed it by feoffment at common law, the livery of seisin would have given a necessary notoriety to the transaction; if by lease and release, at common law, the need of actual entry by the lessee would have made it only a little less notorious; if he had employed a bargain and sale, the statute required an enrolment as to all freeholds, which again would have occasioned the publicity which it was desired to avoid; but by lease by bargain and sale for a year, the possession was in law transferred to the lessee, as if he had entered, the necessity for enrolment was obviated, and thus by two secret deeds the fee simple was conveyed. By this device the general registry of conveyances, which was contemplated by 27 Hen. VIII, c. 16, as a substitute for the notoriety of livery, was evaded, and rendered of little effect.¹⁴

§ 1001. Conveyances Operating under State Statutes. There are in probably all of the states statutes of conveyances which prescribe with what forms land may be conveyed. These provisions are in addition to those of the statutes of frauds which require a deed for the creation or transfer of estates in land greater than for a certain term of years. Under these statutes of conveyances, where the statutory conditions exist and the statutory form is used, the deed will, by force of the local statute, operate to pass the title, without the necessity for livery of seisin or for resorting to the statute of uses.

But it is to be remembered that everywhere a deed which for any reason cannot take effect under the local statute may take effect under the statute of uses as a bargain and sale or a covenant to stand seised, provided the conditions exist which are necessary to raise a use which the statute will execute.¹⁵

¹³ 2 Min. Insts. 810; 2 Th. Co. Lit. 581, note (B); Gilbert, Uses, 228 et seq., note (2).

¹⁴ 2 Min. Insts. 810, 811; 2 Bl. Com. 339; 2 Th. Co. Lit. 582, note (B); 4 Reeves, Hist. Eng. Law, 335.

¹⁵ 2 Tiffany, Real Prop. § 377.

CHAPTER XL.

TITLE BY DEVISE.

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§ 1002. **The Nature of Wills of Land or Devises.** The word “devise” (from Fr. *deviser*—to speak) means a gift by will of real property, whilst the words “legacy” and “bequest” both signify a gift by will of chattels. Hence “devisee” means one to whom real property is devised, and “legatee” one to whom personal property is bequeathed.¹

¹ 2 Min. Insts. 997; 2 Th. Co. Lit. 636, 646.

A will is a declaration, made in due form of law, of a man's mind or last will of what he would have to be done with his estate, whether real or personal, after his death. The word "testament" is synonymous with it; the two words being indiscriminately used in our law.²

A will or testament is always in its nature ambulatory, that is, revocable during the lifetime of the maker; and if truly a will, and not partaking of the nature of a contract, it cannot be made irrevocable by the most express declaration.³

§ 1003. Origin of Devises. Prior to the Norman Conquest, the better opinion seems to be that lands were freely devisable amongst the Anglo-Saxon and Danish people of England, though it would appear to have been rather adopted from the remnant of the Roman laws and customs which they found there, than brought from their own country; for Tacitus, writing of the ancient Germans, says, "*Successores sui cuique liberi at nullum testamentum.*"⁴

After the Conquest (A. D. 1066), and the introduction of the system of feuds, the power of devising lands ceased, except by the custom of particular places, and except, also, as to terms for years in lands, which, on account of their original imbecility and insignificance, were regarded as personalty, and as such were always, like other chattels, disposable by will. This limitation of the testamentary power, as to freehold estates, proceeded partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in case of a last will, partly from a jealousy of deathbed dispositions, but principally from the general restraint of alienation incident to the rigors of the feudal system, as it was established, or at least perfected, by the first William, about twenty years after his succession (say about A. D. 1086).⁵

In the reign of Edward I, the statute of *quia emptores* (18 Edw. I, c. 1, A. D. 1290), removed in great measure this latter bar to the exercise of testamentary power; that is, as to all freeholders, except the king's tenants in capite, as to whom it was also removed by statute, 1 Edw. III, c. 12 (A. D. 1327). But the two former obstructions still continued to operate, and Parliament was not moved, either by its own wisdom or the demands of the people of

² 2 Min. Insts. 997; Bac. Abr. Wills (A).

³ 2 Min. Insts. 997; 2 Th. Co. Lit. 646; 4 Kent, Com. 520; Vynior's Case, 8 Co. 82a.

⁴ Germ. XX; 2 Min. Insts. 997.

⁵ 2 Min. Insts. 998; 2 Bl. Com. 374; 2 Th. Co. Lit. 636, note (2); ante, § 315.

England, to relax or remove the common law restriction in respect to alienating lands by will, until 32 Henry VIII (A. D. 1541). That the English people, jealous as they are, and have ever been, of their rights of property, should have acquiesced so long in their deprivation of the right to dispose of their lands by will, is a remarkable phenomenon, which is only partially explained by the introduction of uses. It will be remembered, that uses came into fashion in the latter part of the reign of Edward III (say about A. D. 1370), and that, ere the lapse of many years, declarations of the use by will were readily protected and enforced in equity as declarations made by any other sort of instrument were; and we saw that uses were not a little recommended to public favor by the fact that they were thus devisable,⁶ and that through that medium the power of devising lands was thus exercised in effect and reality.

But when, in 1536, the famous statute, 27 Hen. VIII, c. 10, was enacted, which was designed to abolish uses altogether, by transferring the possession or legal estate to the use, and was at first supposed to have accomplished its intended purpose, although in the sequel it proved far otherwise, and uses were as easily created as before—when that statute was enacted, and the people found themselves (as was thought) deprived of the power of devising their lands through the medium of uses, they dealt so potentially with the Parliament as, within the then wonderfully short period of five years, to obtain the statute since known as the “statute of wills and devises.”⁷

But by neither of the first statutes of wills was any form or ceremony prescribed, save that the will should be in writing; and very many frauds and perjuries having thence resulted, wholesome safeguards and detailed directions were devised and provided by the oft-cited statute of frauds and perjuries, 29 Car. II, c. 3, for wills, and also for certain other transactions, of which copious explanations have already been presented.

From what has been said, it is apparent that in every country which derives its jurisprudence from England (as do all these states except Louisiana) the right to aliene freehold estates in lands at all, and the mode of alienation, must depend on statute law; and hence the extent of the right, and the mode of exercising it, may

⁶Ante, § 398; 2 Min. Insts. 998, 205.

⁷2 Min. Insts. 998, 999; 32 Hen. VIII, c. 1, explained by 34 Hen. VIII, c. 5 (A. D. 1541, 1543); 2 Th. Co. Lit. 636, note (2). These statutes permitted to be devised all the testator's socage and two-thirds of his chivalry lands; and 12 Car. II, c. 24 (A. D. 1660), having for the most part converted the chivalry tenures of England into socage tenures, pretty much all the lands in the kingdom became thereby devisable. 2 Min. Insts. 999.

be expected to vary, more or less, in the several communities so situated, although, in respect to wills of lands especially, the statutes of the American states generally have been derived from a common English original, besides copying from one another, and are, therefore, in structure, and even in terms, closely assimilated.

§ 1004. Capacity to Devise Land, or Testamentary Capacity. The right to devise lands at all being statutory, the statute determines also the persons who shall be deemed competent by the law so to dispose of their real estate.

The age of testamentary capacity varies from fourteen to twenty-one years. It will be found that, while married women generally are given the capacity to make a will, they are in some states restricted in favor of their surviving husbands as to the amount of property which they can dispose of.

Everywhere it is expressly required that a testator be of sound mind,⁸ and, on general principles, he must not have been induced to make his will by fraud, force, or undue influence.

§ 1005. I. Unsoundness of Mind—1. In General. It is exceedingly difficult to lay down any general rules of universal application, by which to determine whether a testator is of such unsound mind as to deprive him of testamentary capacity.

Some of the older cases seem disposed to go very far in upholding the wills of persons of weak intellect, holding in effect that, if there be a glimmer of reason, testamentary capacity is established.⁹ But the more recent, and the better, view seems to be that each case should be judged according to the circumstances, and to call upon the propounder of the will to satisfy the conscience of the court that the testator, when he executed the will, was ca-

⁸ 3 Washburn, Real Prop. (6th Ed.) § 2436.

⁹ See *Stewart v. Lispenard*, 26 Wend. (N. Y.) 255; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 346, 348, note; *Lee v. Lee*, 4 McCord (S. C.) 183, 17 Am. Dec. 722. In *Stewart v. Lispenard*, supra, the court held a will valid, though executed by a woman who all her life was incapable of taking care of herself, and had to be watched, nursed and put to bed like a child. She could not be taught the Lord's Prayer, nor to read nor write. The utmost scope of her education was to spell words of two syllables. The court, in that case, laid down the following rules, which would scarcely at present be recognized, at least, not in their entirety: (1) That weakness of mind will not avoid a will, if it does not amount to idiocy, lunacy or total imbecility; (2) that in passing upon a will courts do not attempt to measure the extent of the testator's understanding; for if he be not totally deprived of reason, whether he be wise or unwise, he is the lawful disposer of his property, and his will stands as a reason for his actions; (3) that a person's capacity may be perfect to dispose of property by will, and yet inadequate for the management of other business.

pable of knowing and understanding (1) the nature of the business he is then engaged in, (2) the elements of which the will is composed, and (3) the dispositions made therein of his property, both as to (a) the estate disposed of, (b) the persons to whom he means to give it, and (c) the manner in which it is to be distributed among them.¹⁰

Mere eccentricity, however great, does not suffice to invalidate a will.¹¹ So mere old age does not of itself deprive one of the capacity to make a will. The want of recollection of names is one of the earliest symptoms of the decay of memory from old age; but it does not create a testamentary incapacity, unless it be quite total, or extends to the immediate family and property of the testator.¹²

An habitual drunkard is competent to make a will, unless his constant intoxication has produced settled derangement of his mental faculties, or unless he was so intoxicated at the time of executing the will as to have lost temporarily the use of his reason and memory. The condition of mental incapacity is the point to be considered, and that may be produced by a single act of intoxication.¹³

¹⁰ 1 Redfield, Wills, 130; *Converse v. Converse*, 21 Vt. 170, 52 Am. Dec. 58; *Tucker v. Sandidge*, 85 Va. 555, 8 S. E. 650; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489.

¹¹ *Mercer v. Kelso*, 4 Grat. (Va.) 106; *Lee v. Lee*, 4 McCord (S. C.) 183, 17 Am. Dec. 722; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 346, note. Thus, in *Lee v. Lee*, supra, the testator supposed himself continually haunted by witches, devils and the like, which he fancied were always worrying him. He believed that all women are witches ("in which," says the learned court, "he was perhaps not so singular"). He lived in the strangest manner, wore an extraordinary dress, and slept in a hollow log. He imagined that the Wiggins (relatives whom he wished to disinherit) were in his teeth, and to dislodge them he had fourteen sound teeth extracted. He had the quarters of his shoes cut off, saying that if the devil got into his feet he could drive him out the easier. His clothes at his death were appraised at one dollar. He always shaved his head close, so that, as he said, in the contests with the witches, they might not seize hold of his hair, and also to make his wits glib. He fancied at one time he had the devil nailed up in a fireplace at one end of the house, and had a mark made across his room over which he never would pass, nor would he suffer it to be swept. He cut off the tails of all his hogs and cattle close to the roots, saying the cows made themselves poor fighting the flies with their tails, but cut them off and they would get as fat as squabs. And yet, notwithstanding these and many other hallucinations and whimsicalities, the will was established. See note to *Potts v. House*, supra.

¹² 1 Redfield, Wills, 97 et seq.; *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148; *Browne v. Molliston*, 3 Whart. (Pa.) 129. See *Montague v. Allen*, 73 Va. 592, 49 Am. Rep. 384.

¹³ *Temple v. Temple*, 1 Hen. & M. (Va.) 476; *Peck v. Cary*, 27 N. Y. 9,

Formerly, deaf and dumb persons were *prima facie* supposed to be without intellect, since they do not possess the ordinary inlets of learning and knowledge. But this presumption was rebuttable by particular proof of intelligence, as where they could write or make their wishes readily known. In recent times, however, with the modern facilities for instructing such unfortunates and the widespread extent of such instruction, there is no reason to indulge any presumption at all against their intelligence, though the courts will jealously guard against any imposition practiced upon them.¹⁴

§ 1006. Same—2. Lunacy and Monomania. Lunacy may be either total or partial; the one existing at all times and extending to all subjects, the other occurring only at particular times or extending only to particular hallucinations. In either case, when the hallucination enters into and affects the provisions of the will, it invalidates the instrument, which result would always occur if the insanity be total. But if the lunacy is partial only, and the will is made in a lucid interval, or the hallucinations of the testator do not relate to the matters or persons mentioned in the will, it is valid.¹⁵

The fact that a testator has disinherited all his relatives, or has preferred collateral relatives to his next of kin, is only a circumstance tending to show mental incapacity, and, standing alone, is of no value for the purpose of showing the testator's incompetency;

84 Am. Dec. 220, note; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340; *McLaughlin's Will*, 2 Redf. Sur. (N. Y.) 513.

¹⁴ 1 Redfield, Wills, 52 et seq.

¹⁵ *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 353, 354, note; *Pidcock v. Potter*, 68 Pa. 342, 8 Am. Rep. 181, 188, note; *Dew v. Clark*, 1 Hagg. Ecc. 311. The last case is a striking illustration of that delusion in relation to the act in question, which may defeat a will, while the testator may be sane on all other subjects. In that case the testator was a sensible man, conducting himself rationally in his affairs and in the ordinary transactions of life. His friends never even suspected that he was deranged. Yet it was shown that he labored under some strange hallucinations both as to himself and his daughter. She was proved to have been always amiable in her disposition, of superior talents and engaging manners, diligent, patient, dutiful and religious; yet in the deluded mind of the father she was the most extraordinary instance of depravity, vice, crime, profligacy and disobedience, and quite irreclaimable, while he considered himself a pattern of fatherly tenderness and affection, though tying his daughter to a bed post and flogging her unmercifully, and compelling her to perform the most menial drudgery. These impressions were recorded in his will, but Sir John Nichols, taking a different view of both father and daughter from that of the testator, pronounced against the testator's competency and the validity of the will. See *Boyd v. Eby*, 8 Watts (Pa.) 71, 72.

for a testator may do what he wills with his own, though he act unjustly to his relatives. But, taken with other circumstances, the fact of such disposition may be of considerable weight in establishing mental unsoundness or undue influence.¹⁶

The proof of the testator's insanity may be made either by the subscribing witnesses to the will, by expert medical evidence, or by the evidence of any person cognizant of the circumstances, disposition, daily life or actions of the testator. Such person is always at liberty to testify to the facts within his knowledge, and is sometimes permitted to give his impression of the testator's general mental condition. And in any event the proof must be clear and convincing.¹⁷

§ 1007. II. The Age of Capacity. In most states this is fixed, for wills of real property, at twenty-one years; in some, it is eighteen years; and in one (Georgia), fourteen years.¹⁸

The only point that need demand our attention under this head is whether testator of nonage has the same right as he would have in the case of a contract made by him to confirm the will when he comes of age, without republishing it or executing a new will.

The English authorities lay down the rule, seemingly without qualification, that the mere ratification of the will by the infant testator, after he becomes of legal age to execute it, renders it a valid instrument, without a republication or a re-execution thereof.¹⁹ But while this may be true as to wills of personalty, the right to make which in general exists at common law, and is not dependent upon statute, it would seem that in the case of devises of land, which can be made at all only by virtue of statute, the devise is void (not merely voidable) if the statute is not conformed to, and is therefore incapable of ratification, otherwise than by re-executing the will after the testator reaches the age prescribed by the statute for that purpose.²⁰

¹⁶ *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, note; *Calhoun v. Jones*, 2 Redf. Sur. (N. Y.) 38; *Addington v. Wilson*, 5 Ind. 137, 61 Am. Dec. 81, note; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235, note; *Nicholas v. Kershner*, 20 W. Va. 251; *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

¹⁷ 1 Redfield, Wills, 31, 32; *Gray v. Rumrill*, 101 Va. 507, 44 S. E. 697; *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. 650; *Porter v. Porter*, 89 Va. 118, 15 S. E. 500; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 333, note; *Clary v. Clary*, 52 N. C. 78; *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 349, note.

¹⁸ 3 Washburn, Real Prop. (6th Ed.) p. 506, where the statutes of wills of the various states and territories are collated.

¹⁹ 1 Williams, Ex'rs, 16; Bac. Abr. Wills (B).

²⁰ 1 Redfield, Wills, 19.

§ 1008. III. **Effect of Fraud, Force or Undue Influence upon the Testator.** It is manifest that a will, to be valid, must express and represent the real, as well as the last, will of the testator. Hence, where physical constraint is employed, the will is invalid. But it is in like manner void wherever it appears that the testator's freedom of volition has been impaired in consequence of his imbecility, some deception practised upon him, his undue confidence, his overweening affection, or otherwise.²¹

The principles controlling the doctrine of undue influence are necessarily vague, because of the extreme difficulty—not to say impossibility—of defining such influence. The cases also are numerous and various almost beyond parallel; and if one should become familiar with them all, it would tend but little to disclose any salient principle which would resolve the next case.

It is believed that the doctrine may be fairly summarized in the propositions following, namely:

(1) Undue influence, in order to avoid a will, must annul the testator's freedom of purpose, and render the instrument the offspring of the will of others, rather than of his own;

(2) Honest intercession, argument and persuasion addressed to the testator's understanding, conscience or affection, not controlling his will in opposition to his judgment or inclination, and not coupled with fraud or imposition, will not amount to undue influence, though urged beyond the bounds of strict propriety;

(3) Influence gained by kindness and affection will not be regarded as undue, if no imposition nor fraud be practised, even though the testator be induced thereby to make an unequal or even an unjust distribution of his property;

(4) The influence, in order that it shall be undue, must be exerted specifically, upon the very act of making a will in favor of particular parties; and

(5) It must mislead him to the extent of making a will essentially contrary to his duty.

These propositions are sustained by a long array of authorities and decisions.²²

²¹ 2 Min. Insts. 1047; 1 Jarman, Wills (5th Am. Ed.) 35, note 1; 1 Redfield, Wills, 508 et seq., 524, 535, 537; *Simmerman v. Songer*, 29 Grat. (Va.) 24.

²² 2 Min. Insts. 1040, 1048; *Hoover v. Neff*, 107 Va. 441, 59 S. E. 428; 1 Redfield, Wills, 524 et seq.; *Small v. Small*, 4 Greenl. (Me.) 220, 16 Am. Dec. 257 et seq., note. See, also, *Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402, note; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340, 354, note; *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; *Floyd v. Floyd*, 3 Strob. (S. C.) 44, 49 Am. Dec. 629; *Woodward v. James*, 3 Strob. 552, 51 Am. Dec. 649; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 355.

§ 1009. **Capacity to Take under a Devise.** There are no incapacities in this respect imposed upon natural persons, except alien enemies. Married women, aliens, lunatics, and infants may be devisees. The only other restrictions on capacity that we find, either in England or in this country are imposed upon corporations.²³

§ 1010. **Same—Devise Void, Where It is to Testator's Heir, to Take in Like Manner as He would Take as Heir.** The law forbids a testator to devise lands to his heir, to take them in like manner as he would take them as heir, in order to prevent title by descent from being confounded with title by purchase. Such confusion, in feudal times, would have affected the tenure of lands, and at a later period would have impaired the interests of creditors, certain of whom could charge with their debts lands descended, but not lands devised, except in pursuance of a comparatively modern statute (3 & 4 Wm. & M. c. 14), known as the statute of fraudulent devises.²⁴

The test by which we may determine the applicability of the doctrine to any particular case is to strike out the devise to the heir, and if he would still take the same interest as the will gives him the devise is void.

§ 1011. **Disclaimer of Title by Devisee.** No one can be compelled to take land by devise. But the decisions in the different states are not in accord as to whether a disclaimer may be by parol or must be by deed.²⁵

§ 1012. **What Property is Devisable.** While at common law a will passed what personal property the testator had at his death, under the statute of wills it was held that a will could only pass such real property as the testator owned at the time of making the will. It is believed that this doctrine has been changed by statute everywhere in this country, so that a will may pass subsequently acquired real property. The point to be noticed in this connection is that some of the statutes make the will, in the absence of any expression of intention as to whether after-acquired lands should pass, speak as of the time of making the will, thus excluding after-acquired lands; others make the will speak as of the time of the death of the testator, thus including such lands. In any case the question is one of intention, which must be gathered from the terms of the will, aided by the statutory presumption.²⁶

²³ 3 Washburn, Real Prop. (6th Ed.) § 2438.

²⁴ 2 Min. Insts. 1045. See *Ellis v. Page*, 7 Cush. (Mass.) 161.

²⁵ *Bryan v. Hyre*, 1 Rob. (Va.) 94, 39 Am. Dec. 246; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; 4 Kent, Com. 533.

²⁶ 3 Washburn, Real Prop. (6th Ed.) § 2434.

§ 1013. **Formalities Required in the Execution of a Devise.** In this respect, as in other matters relating to wills of lands, the statute must be closely followed, or else the will is void.

The statute that governs a will of lands is that of the state in which the land devised is situated.²⁷

In the analysis of every statute it will be necessary to consider the following heads: (1) The will must be in writing; (2) the signature of the testator; (3) the holograph will; (4) the attestation by the subscribing witnesses; (5) the competency of the witnesses.

§ 1014. **Same—The Will must be in Writing.** It is not material upon what matter or stuff it be written, whether paper or parchment, linen, leather, stone, or metal, or in what tongue, or whether in print or manuscript, with ink or in pencil, or in what kind of handwriting, or character, so it is legible, and the meaning be capable of being deciphered. Neither is it material whether it be expressed at large, or by mere notes, usual or unusual, or whether sums of money, etc., be written in words or in figures, provided the meaning be free from ambiguity and doubt.²⁸

A will, however, if in writing, need not be confined to one paper, but may consist of several testamentary papers of different dates, and the expression in the paper subsequently executed, "This is my last will," is not entitled to any weight, in the absence of a clause revoking former wills. In such cases, if the subsequent paper is merely supplemental, it will be treated as a codicil; if partially conflicting, that of later date will operate to revoke the former only so far as the provisions of the two are conflicting or incompatible, the court adopting that construction which will give effect to all the testamentary papers, if possible, sacrificing the earlier papers only to the extent that they are clearly irreconcilable with the later.²⁹

It is to be observed that the whole will must be in writing as the statute directs, and hence a gift (absolute on the face of the will) to one named as devisee is none the less absolute because accompanied by verbal instructions creating a trust in the devisee for the benefit of another. Any unwritten part of a will is void and inoperative, in the absence of fraud. But if it appears upon the

²⁷ But in many states it is enacted that a will executed according to the law of the state where the testator resides shall be valid in the enacting state. 3 Washburn, Real Prop. (6th Ed.) § 2427. Even in such case, however, the validity of the will depends upon the *lex rei sitæ*.

²⁸ 2 Min. Insts. 1011; Bac. Abr. Wills (D), 1; Masters v. Masters, 1 P. Wms. 425, 426; Dickenson v. Dickenson, 2 Phill. (2 Eng. Eccl.) 173. Will written on a slate admitted to probate. See 7 Va. Law Reg. 63.

²⁹ Gordon v. Whitlock, 92 Va. 723, 24 S. E. 342.

face of the will that the property is given to the devisee by way of trust for another, while verbal instructions as to the beneficiary cannot be given effect, the beneficiary may sometimes be inferred from that portion of the will which is in writing; if not, then he holds it for the benefit of the testator's heirs or residuary devisee.³⁰

But an exception to this rule is allowed in equity, where the devisee has procured an absolute devise to himself by promising the testator that he would hold it for the benefit of another, and afterwards refuses to perform his promise, claiming the property in his own right under the will and for his own benefit. This exception is allowed upon the ground of the trust resulting from the confidence reposed in him by the testator, and because not to do so would be to permit the devisee to profit by his own fraud, and to convert the statute of wills into a law for the consummation of fraud, instead of for its prevention.³¹

It may be further observed in this connection that a written paper may be good as a will, though not in testamentary form or without the testator's knowledge that he has made a will. Thus, writings in the form of deeds, letters, bonds, notes, etc., have been held to be effectual as wills, where they were not intended to take effect until after the maker's death, and actually represent the expression of the party's last will, supposing always that the requirements of the statute of wills have been complied with.³²

§ 1015. Same—The Signature of the Testator. The English statute, 29 Car. II, c. 3, § 5, did not prescribe where the signature should be placed, and soon after the enactment of the statute, it was determined in the great case of *Lemayne v. Stanley*,³³ that it was immaterial, if the name were written by the testator himself, or by his direction and in his presence, where it appeared; whether at the top or bottom, or in the margin. This decision (made 33 Car. II, A. D. 1682) was often regretted, but never directly overruled, until it was done by statute both in England and in many states of this country. It was agreed that the object in requiring the testator's signature was twofold, namely: (1) To connect him with the paper; and (2) to afford proof of the finality, or completion

³⁰ *Sims v. Sims*, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772; *Olliffe v. Wells*, 130 Mass. 221.

³¹ *Pomeroy*, Eq. Jur. §§ 430, 919, 1054; *Sims v. Sims*, 94 Va. 583, 27 S. E. 436, 64 Am. St. Rep. 772; *Sprinkle v. Hayworth*, 26 Grat. (Va.) 392; *Towles v. Burton*, Rich. Eq. Cas. (S. C.) 146, 24 Am. Dec. 409, note; *Hoge v. Hoge*, 1 Watts (Pa.) 163, 26 Am. Dec. 52, note.

³² 2 Min. Insts. 1037; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Turner v. Scott*, 51 Pa. 126.

³³ 3 Lev. 1; 2 Min. Insts. 1011.

of the testamentary intent. It was admitted, also, that the first object was satisfactorily attained by the testator's signature occurring anywhere in the paper. But it was insisted that the second object was wholly frustrated by allowing the signature to be anywhere else but at the end; and in response to the suggestion that the finality of testamentary intent was proved by the attestation of the subscribing witnesses, it was said that the statute designed two safeguards, the attestation of the witnesses, and the signature also, and that the courts thwarted the design of the Legislature when they dispensed with either.³⁴

Then, in 1850, came the statute (taken from 7 Wm. IV and 1 Vict. c. 26; see, also, 15 and 16 Vict. c. 24) requiring that the signature should be affixed in such a manner as to make it manifest that the name was intended as a signature; and this legislation has been followed in many states of this country, some of the statutes specifically requiring (as in New York) that the will be subscribed by the testator.³⁵

The testator may "subscribe" by making his mark.³⁶

Nowhere in this country is a seal required to give validity to a will.³⁷

§ 1016. Same—Holographic Will. Some of our statutes dispense with the necessity for attesting witnesses altogether if the will is "holographic"—wholly written by the testator.³⁸

§ 1017. Same—Attestation of Will by Subscribing Witnesses. Not only do the statutes prescribe the number of witnesses, but some of them are very strict in requiring that the witnesses shall see the testator sign and that they shall subscribe their names as witnesses in the presence of the testator and of each other.³⁹

It is important that the attestation clause should recite every fact in this regard made essential by the statute.

§ 1018. Same—The Competency of the Attesting Witnesses. The attesting witnesses (two or more in number) must be competent. The word employed in the statute, 29 Car. II, c. 3, § 5, and in many of the American statutes, is "credible." However, it was universally agreed that "credible" meant no more and no less than "competent," so that no progress was made in substituting

³⁴ 2 Min. Insts. 1011, 1012; 2 Bl. Com. 376, 377, note (9).

³⁵ See the compilation of statutes in 3 Washburn, Real Prop. (6th Ed.) p. 506.

³⁶ Van Hanswyck v. Wiese, 44 Barb. (N. Y.) 494.

³⁷ See the compilation of statutes, *supra*.

³⁸ See 3 Washburn, Real Prop. (6th Ed.) p. 506 et seq.

³⁹ See 3 Washburn, Real Prop. (6th Ed.) p. 506 et seq.

the one word for the other, as some of the American statutes have done.⁴⁰

It is useless to rehearse the conditions which, at common law, rendered a witness incompetent. Suffice it to say that the statutes removing the incompetency of witnesses by reason of interest do not apply to the attesting witnesses to a will, as far as proving the will is concerned.⁴¹ Hence, a beneficiary under a will should never be called to witness it. In England a devise to a witness is void; but generally in this country such devise is valid if there are the requisite number of witnesses to prove the will in addition to such devisee, who is incompetent as a witness.⁴²

The competency required of the witnesses relates to the time of the execution of the will, and not to the time of probate.⁴³

§ 1019. The Revocation of Wills. Wills of all kinds are in their nature revocable, or ambulatory, as it is styled, and cannot by the most express words be made otherwise, although, to be sure, a contract may be disguised under the name and appearance of a will, which, according to the nature of contracts, will be irrevocable.⁴⁴

Originally in England, even wills of land might have been revoked by words only; the statute of wills, 32 & 34 Hen. VIII, being silent as to revocations.⁴⁵ The English statute of frauds,⁴⁶ however, provided against the mischief which would have ensued, had the omission continued, by enacting that no devise in writing should be revoked, except by some other will, codicil, or writing,

⁴⁰ 2 Min. Insts. 1013.

⁴¹ 3 Washburn, Real Prop. (6th Ed.) § 2431; *Nixon v. Armstrong*, 38 Tex. 290.

⁴² 3 Washburn, Real Prop. (6th Ed.) § 2431.

⁴³ *Holdfast v. Downing*, 2 Str. 1254; *Hatfield v. Thorp*, 5 B. & Ald. 589; *Brograve v. Winder*, 2 Ves. Jr. 636; 2 Min. Insts. 1013. See, also, *Sears v. Dillingham*, 12 Mass. 358; *In re Holt's Will*, 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481, 45 Am. St. Rep. 434; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107, 30 L. R. A. 143, 51 Am. St. Rep. 121. Thus it is admitted that, if the attesting witnesses are dead (and it is believed the same principle would apply, if they should become otherwise incompetent), the will may be probated upon the testimony of other witnesses as to the signatures of the attesting witnesses, etc., which could only be upon the theory that the incompetency of the attesting witnesses at the time of probate does not impair the validity of the will. See 2 Min. Insts. 1037.

⁴⁴ 2 Min. Insts. 1021; 6 Va. Law Reg. 389; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 784, note.

⁴⁵ 2 Min. Insts. 1021; *Lawson v. Morrison*, 2 Dall. (Pa.) 286, 1 L. Ed. 384, 1 Am. Dec. 288, 2 Am. Lead. Cas. 643.

⁴⁶ 29 Car. II, c. 3, § 6.

or by burning, tearing, cancelling or obliterating the same by the testator, or by another in his presence, and by his direction. But to these modes of revocation the courts of chancery added, by construction and implication, two others, namely, by a subsequent change of estate on the part of the testator, and by a subsequent marriage and birth of a child (or in case of a woman, subsequent marriage alone), which two latter circumstances, however, those courts held to afford a mere presumption, which might be repelled, either by other circumstances, or by declarations to the contrary.⁴⁷

The subsequent change in the manner of holding the estate (as if he should sell and afterwards buy it back again) operated a conclusive revocation, not on the basis of the testator's intention, which was wholly immaterial, but on the ground that the statute of wills did not enable one to devise what he had not at the making of the will, and the subsequent sale and repurchase was regarded, logically enough, as a new acquisition.⁴⁸

Statutes in this country have adopted a similar policy by prescribing the modes of revoking wills, and some of them define what shall be implied, as well as express revocations.

§ 1020. I. Express Revocation of Wills. The statutes are emphatic in declaring that no express revocation can be made except in the modes prescribed, and, moreover, that a destruction or mutilation, in order to work a revocation, must be with the intent to revoke.

And, independently of statute, a valid conveyance by the owner of land, subsequent to the execution of his will, to the extent that it is inconsistent with the will, revokes it.⁴⁹ "But if the conveyance be void or voidable, as by reason of the want of proper formalities, the want of capacity of the grantee to take, or for fraud, though in England it seems to have the effect of revoking the will,"⁵⁰ it is very doubtful if such effect would be given it in this country.⁵¹

⁴⁷ Post, §§ 1022, 1023; 2 Min. Insts. 1021; Bac. Abr. Wills (II), 1.

⁴⁸ 2 Min. Insts. 1021.

⁴⁹ *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; *Collup v. Smith*, 89 Va. 264, 15 S. E. 584.

⁵⁰ 1 Jarman, Wills (4th Ed.) 165; *Montague v. Jeoffreys*, Moore, 429; *Hick v. Mors*, Ambl. 215; *Simpson v. Walker*, 5 Sim. 1. It is said, however, that this rule is no longer in force in England, on the theory that, as a valid conveyance no longer effects a revocation if the title becomes re-vested in testator, one which is invalid should be given no greater effect. 2 Tiffany, Real Prop. § 417; 1 Jarman, Wills, 133.

⁵¹ See *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339; *Bennett v. Gaddis*, 79 Ind. 347.

§ 1021. Same—Express Revocation Dependent upon Intention.

Express revocation of every sort depends on intention, to be derived, when the revocation is by subsequent will or declaration in writing, from the words, interpreted according to law, and, when by the cancellation or destruction of the will, from the surrounding circumstances and the act done. And although, when the revocation is by words contained in writings, parol evidence is not admissible to alter their meaning, yet it may often be employed to prove circumstances which will rebut the *prima facie* inferences to be gathered from words or conduct, showing that the imputed intention did not exist, or that it really applied to something else, and not to the instrument canceled, destroyed, or revoked.⁵²

Thus, if the revocation appear to have been founded on a misapprehension of existing circumstances, as upon a mistaken impression in respect to the death of a former legatee, whether it be derived from words or acts, the revocation is inoperative. For example, an English testator, by will dated August, 1790, gave a legacy of £500 each to the grandson and granddaughter of his sister, the parties being described as residing in Virginia, and 5th January, 1791, added a codicil revoking the bequest, the legatees "being all dead." The legatees were not dead, and Lord Chancellor Loughborough held that the legacies were not revoked.⁵³ In this case, if the mistaken assumption that the legatees were all dead had not appeared upon the face of the will as the reason for the revocation, the fact that this was the real, though mistaken, cause thereof could not have been shown by extrinsic evidence.⁵⁴

So, also, if the ground for revocation, as stated by the testator in the codicil, had not been the mistaken assumption of fact, but had been a belief that the legatees were all dead, upon which belief he acted, or if the revocation is stated to be based upon certain advice given the testator, though the advice be grounded in misapprehension of the facts, since in these cases the testator is acting upon the belief or upon the advice, each of which is a real fact, the will is revoked.⁵⁵

And so, when any of the words or clauses in a will are erased, merely for the purpose of substituting others which cannot legally

⁵² 2 Min. Insts. 1025. See *Mourey's Case*, 1 Hagg. (3 Eng. Eccl.) 378; *Evans v. Evans*, 10 Ad. & El. 228; *Lawson v. Morrison*, 2 Dall. (Pa.) 286, 1 L. Ed. 384, 1 Am. Dec. 288, 2 Am. Lead. Cas. 648, 649; *Skipwith v. Cabell*, 19 Grat. (Va.) 758.

⁵³ *Campbell v. French*, 3 Ves. Jr. 321; 2 Min. Insts. 1025.

⁵⁴ *Skipwith v. Cabell*, 19 Grat. (Va.) 758.

⁵⁵ *Skipwith v. Cabell*, 19 Grat. (Va.) 758.

take effect, the purpose of revocation will be considered subsidiary to that of substitution, and both will fail of effect together.⁵⁶ This principle of "dependent relative revocation," as it is sometimes termed, has been applied where a testator has cancelled certain clauses of his will, with the intention of substituting others, but without re-executing the will after making the alterations, and the cancellation has been held not a revocation.⁵⁷ And so where a testator destroys his will under the mistaken impression that a previously revoked will would thereby be rendered valid.⁵⁸

§ 1022. Same—1. Express Revocation by Subsequent Will or Codicil, Executed Like a Will. A subsequent will or codicil, duly executed, operates as a revocation of a former one in all cases where it contains an express clause revoking all former wills, or where it makes a different and incompatible disposition of the land devised by the former one.⁵⁹

The intention to revoke is what gives effect to the revocation, and therefore, where such an intent appears, the subsequent will or codicil will operate a revocation of the prior will, notwithstanding such subsequent will, etc., may be void from disability in the devisee to take, as where it is to the poor of the parish of C., or to an unincorporated association, etc., in which cases the devise is ineffectual by reason of the uncertainty of the intended beneficiaries. Hence, also, if there be no clause of express revocation in the subsequent will, and the disposition of the property be not inconsistent with the former will, there is no revocation of the former, but both are good.⁶⁰

From the principle just stated it follows that, although it appears in proof, and be found, that there was a subsequent will,

⁵⁶ 2 Min. Insts. 1025; *Short v. Smith*, 4 East, 419; *Locke v. James*, 11 M. & W. 901; *Rippon's Goods*, 2 Curt. 332; *Onions v. Tyrer*, 2 Vern. 742.

⁵⁷ 2 Tiffany, Real Prop. § 417; *Winsor v. Pratt*, 2 Brod. & B. 650; *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. Rep. 363; *Gardner v. Gardner*, 65 N. H. 220, 19 Atl. 651, 8 L. R. A. 383; *In re Penniman's Will*, 20 Minn. 245 (Gil. 220), 18 Am. Rep. 368.

⁵⁸ *Powell v. Powell*, L. R. 1 Prob. & Div. 209. But the fact that the act of destruction is accompanied by an intention to make another will in the future does not prevent the act from effecting a revocation, though the intent to execute a new will be never carried out. 2 Tiffany, Real Prop. § 417; *Brown v. Thorndike*, 15 Pick. (Mass.) 388; *Semmes v. Semmes*, 7 Har. & J. (Md.) 388; *Banks v. Banks*, 65 Mo. 432; *Olmsted's Estate*, 122 Cal. 224, 54 Pac. 745.

⁵⁹ 2 Min. Insts. 1022.

⁶⁰ 2 Min. Insts. 1022; *Coward v. Marshall*, Cro. (Eliz.) 721; *Gordon v. Whitlock*, 92 Va. 723, 24 S. E. 342.

but it does not appear what were its contents, or whether it even revoked the previous will, or made a disposition of the property incompatible therewith, there is no revocation, not even though it be found that the disposition was different, but in what particulars is unknown.⁶¹

§ 1023. Same—2. Express Revocation by Declaration to That Effect, in Writing, Executed Like a Will. The English statute of frauds, 29 Car. II, c. 3, makes a difference between the mode of executing a will (as to which section 5 requires that the witnesses should subscribe in the presence of the testator), and a revocatory declaration in writing, as to which section 6 requires that the deviser should sign in the presence of the witnesses, without requiring that the witnesses should subscribe in the testator's presence. And this difference led to some subtle distinctions. Thus, it was held that whilst a will might be revoked by a written declaration, although the witnesses did not subscribe in the testator's presence, yet it would not be revoked by an instrument intended to operate as a will, and containing a clause of revocation, which the attesting witnesses did not subscribe in the testator's presence, and that, not being valid as a will, for which it was designed, it could not be treated as a good writing to revoke the first will, it being the sole purpose of such a writing to revoke or destroy a previous will, and not to make a new disposition of property.⁶²

The American statutes, however, seem to obviate all diversities of this kind, requiring the revoking declaration to be executed like a will, just as the revoking will or codicil is.

§ 1024. Same—3. Express Revocation by Destroying the Will, with Intent to Revoke the Same (Animo Revocandi). The American statutes declare that a will may be revoked by the destruction or mutilation of it by the testator, or some one in his presence and by his direction, with the intent to revoke. The statutes specify several acts in this connection, thus: "Cutting," "tearing," "burning," "obliterating," "cancelling," "destroying the will or the signature thereto."⁶³

In order, by this means, to effect the revocation of a will, there must be done some one of the acts specified, however slight it

⁶¹ 2 Min. Insts. 1023; *Hitchins v. Basset*, 2 Salk. 592, note (a); *Goodright v. Harwood*, 3 Wils. 497, 511, et seq. See *Glasscock v. Smither*, 1 Call (Va.) 479.

⁶² 2 Min. Insts. 1023; *Onions v. Tyrer*, 1 P. Wms. 344, 2 Vern. 741.

⁶³ See the compilation of statutes in 3 Washburn, Real Prop. (6th Ed.) p. 506 et seq.

may be, and with the specified intent. Mere words and directions, how pointed and peremptory soever, will not suffice.⁶⁴

Hence, where a blind man orders his will to be destroyed, and believes that it is destroyed accordingly, but no act is done towards its destruction, it is not a revocation.⁶⁵

On the other hand, any of the acts mentioned, however slight they may have been, if accompanied by the intent to revoke, and if the testator, with that intent, has done all he designed to do in pursuance of his purpose, will operate a revocation, but not if he abandons his purpose before he completes the act which he designed.⁶⁶

And where a will is found after the testator's death, among his repositories, mutilated or defaced, it is presumed to have been done by himself, and done *animo revocandi*.⁶⁷ So, also, where the testator has his will in his own custody, and after his death it cannot be found, the presumption is that he destroyed it himself.⁶⁸ And if there be duplicates of the will in the possession of different persons, including the testator himself, and that copy in his own custody be not found after his death, all are revoked, for all together constitute but one will.⁶⁹

It appears that if a testator, who has duplicates of his will in his possession, cancels or destroys one of them, and preserves the other in its original condition, the presumption is in favor of a revocation; but it may be rebutted by evidence that such was not the intent.⁷⁰ But where he destroys or cancels the only copy in his possession, the presumption of revocation is so strong that nothing short of the most direct and positive evidence will justify

⁶⁴ 2 Min. Insts. 1024; *Pemberton v. Pemberton*, 13 Ves. 290; *Doe v. Harris*, 6 Ad. & El. 209; *Malone v. Hobbs*, 1 Rob. (Va.) 346, 39 Am. Dec. 263.

⁶⁵ *Kent v. Mahaffey*, 10 Ohio St. 204; *Boyd v. Cook*, 3 Leigh (Va.) 32.

⁶⁶ 2 Min. Insts. 1024; *Bibb v. Thomas*, 2 W. Bl. 1064; *Doe v. Perkes*, 3 B. & Ald. 489.

⁶⁷ 2 Min. Insts. 1024.

⁶⁸ 2 Min. Insts. 1024; *Knapp v. Knapp*, 10 N. Y. 276; *Idley v. Bowen*, 11 Wend. (N. Y.) 227; *Foster's Appeal*, 87 Pa. 67, 30 Am. Rep. 340; *In re Valentine's Will*, 93 Wis. 46, 67 N. W. 12. But this presumption may be rebutted by evidence that the will was accessible to others, who might have destroyed it, or by showing that the testator's intentions as to the disposal of his property remained unchanged till his death. 2 *Tiffany*, Real Prop. § 417; *Chaplin*, Wills, 358, 361; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *Harris v. Harris*, 10 Wash. 555, 39 Pac. 148.

⁶⁹ 2 Min. Insts. 1024; *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492; *Appling v. Eades*, 1 Grat. (Va.) 286; *Lawson v. Morrison*, 2 Dall. (Pa.) 286, 1 L. Ed. 384, 1 Am. Dec. 288, 2 Am. Lead. Cas. 653 et seq.

⁷⁰ 2 Min. Insts. 1024; *Pemberton v. Pemberton*, 13 Ves. 310; *Roberts v. Round*, 3 Hagg. 548; *Utterson v. Utterson*, 3 Ves. & B. 122.

the inference that an outstanding duplicate is not within the scope of the revoking intention.⁷¹

§ 1025. II. Implied Revocation of Wills—1. Implied from a Subsequent Change of Estate. In England, as we have seen, implied revocations of wills arose, not out of the terms of the statute of frauds, 29 Car. II, c. 3, §§ 5, 6, but in spite of very positive provisions in that statute to the contrary, out of the construction of the courts of chancery. The courts, both of law and equity, from the time of the enactment of the statutes of wills, 32 & 34 Hen. VIII, had assimilated wills of lands to conveyances, and were, therefore, by that construction, obliged to consider them as embracing, not such lands as the testator might own at his death (as was the construction of wills of chattels), but such only as he possessed at the date of the will. Hence, if at any time after making his will he sold the lands then owned by him, the will could no longer be applicable to them, although he should afterwards reacquire them, and die seised thereof. And so, any alteration of the testator's estate after the making of the will would have in like manner the effect to defeat the will, at least *pro tanto*; that is, to the extent of the alteration. Thus arose one of the instances of implied revocation.⁷²

§ 1026. Same—2. Revocation Implied from Testator's Subsequent Marriage. Another constructive revocation the courts of equity derived, notwithstanding the peremptory language of the statute of frauds, 29 Car. II, c. 3, § 6, from considerations of domestic duty and convenience, where, after the making of the will, the testator, if a woman, married, or, if a man, married and had a child born. This, however, was founded upon a mere presumption of a purpose on the testator's part to put the will aside, in order to provide for persons who had become thus intimately connected with him, and in the woman's case upon the additional consideration that a will is in its nature ambulatory, and, as after marriage she could not change it, if it were not revoked by the marriage, it would be practically not a will, but a grant.⁷³

Seeing, therefore, that the implication is founded upon a presumption of intention, the courts held that it might be repelled, as we have seen, by showing that no such intention existed, either

⁷¹ 2 Min. Insts. 1025; *Richard v. Munford*, 2 Phil. 23; *Calvin v. Fraser*, 2 Hagg. 266.

⁷² 2 Min. Insts. 1025, 1026; *Lawson v. Morrison*, 2 Dall. (Pa.) 286, 1 L. Ed. 384, 1 Am. Dec. 288, 2 Am. Lead. Cas. 668 et seq.; *Bac. Abr. Wills (H)* 1.

⁷³ 2 Min. Insts. 1026; *Bac. Abr. Wills (H)*, 1; *Sprague v. Stone*, 2 Ambl. 721.

by express declarations, or by circumstances, as that the wife and children were adequately provided for otherwise.⁷⁴

§ 1027. **Same—3. Revocation Implied from Subsequent Birth of Pretermitted Children.** "There are provisions in the statutes of many, if not all, of the United States for posthumous children, where none is made in the will of the testator, in some cases avoiding the will altogether, and also, in some cases, for children not named in the will when the omission is accidental. But a testator may omit, if he sees fit, to make any provision for any or all of his children, and the will nevertheless will be valid, if he clearly indicates thereby that such was his understanding and intention."⁷⁵

§ 1028. **Republication or Revival of Revoked Wills.** What is meant precisely by the publication of a will is not entirely clear. It is supposed to be the declaration by which a person designates that he means to give effect to a paper as his will, although it does not seem to be necessary that he should describe it as being his will; and his silently signing it, and procuring witnesses duly to attest it according to the statute, would doubtless be a sufficient declaration.⁷⁶

Prior to the statute 29 Car. II, c. 3 (which in terms placed the republication of wills on the same footing as their execution), any act or expression was sufficient to set up even a revoked will (not physically destroyed), which showed an intention to treat the will as a valid and subsisting instrument. Thus, in that state of the law, the subsequent verbal "allowance" of a will was held a sufficient republication to pass after-acquired lands, if the terms employed adequately comprehended them, as was also a parol declaration that after-acquired lands should go with others previously devised. Republication, apart from and prior to the statute of frauds, was in fact the converse of a revocation, and, like it, was open to the whole range of parol evidence.⁷⁷

Republication is of two kinds, express and constructive: Express, where the testator repeats those ceremonies which are required for the valid execution of a will, with the avowed design of republishing it; and constructive, where a testator, for some oth-

⁷⁴ 4 Kent, Com. 521, 523.

⁷⁵ 3 Washburn, Real Prop. (6th Ed.) § 2474. Where a child is omitted in a will, the burden of proving that it was intentionally done is on the devisee who claims under the will. *Ramsdill v. Wentworth*, 106 Mass. 320.

⁷⁶ 2 Min. Insts. 1029; *Moodie v. Reid*, 7 Taunt. 355; *Lawson v. Morrison*, 2 Dall. (Pa.) 286, 1 L. Ed. 384, 1 Am. Dec. 288, 2 Am. Lead. Cas. 675.

⁷⁷ 2 Min. Insts. 1029; *Beckford v. Parnecott*, Cro. (Eliz.) 493; *Barnes v. Crowe*, 2 Ves. Jr. 497; *Lawson v. Morrison*, 2 Dall. (Pa.) 286, 1 L. Ed. 384, 1 Am. Dec. 288, 2 Am. Lead. Cas. 674 et seq.

er purpose, makes a codicil to his will, in which case the effect of the codicil, independently of statute, if it contains no internal evidence of a contrary intention, is to republish the will, and thus bring it down to the date of the codicil.⁷⁸

§ 1029. Same—Effect of Revocation of Revoking Will. Independently of statute, it is a vexed question whether, if a subsequent will revokes a former will, and be itself revoked, the former is thereby revived; and upon that point a reasonable distinction appears to be taken between those acts of revocation of the first will which are not essentially testamentary in their nature, but absolute (e. g., by cancellation or destruction, etc., or by revocatory declaration in writing), and those which are contained in subsequent wills, etc., which in their nature are ambulatory and revocable—the better opinion being, as it seems, that the effect of an absolute or unconditional revocation is final, and cannot be annulled or varied by any evidence of a subsequent change of intention, short of a republication or re-execution; whilst, if the revocation be by a subsequent will, its own ambulatory and revocable character is communicated to all acts of which it is made the medium, and that, therefore, the cancellation or other revocation of a revoking will is to be regarded as a revival of that which it revoked.⁷⁹

§ 1030. Lapsed Devises. Where a devisee dies before the testator, the devise—at least that part of it which refers to the dead devisee—is at common law liable to become void, or, according to the technical phrase, to lapse.

The general doctrine, at common law, is that a devise lapses in all cases where the devisee dies before the testator. And if the devise be to several, as tenants in common, and one of them dies in the testator's lifetime, his share lapses.

But by force of statute, in some of our states, if a devise be made to a son or grandson of the testator, it will take effect in favor of his heirs, if he die before the testator.⁸⁰

§ 1031. Same—Effect of Lapse upon Residuary Clause. Inasmuch as a will of lands is presumed at common law to speak the intention of the testator at the time he made the will, a residuary

⁷⁸ 2 Min. Insts. 1029, 1030; *Lawson v. Morrison*, 2 Dall. (Pa.) 286, 1 L. Ed. 384, 1 Am. Dec. 288, 2 Am. Lead. Cas. 676.

⁷⁹ 2 Min. Insts. 1030; *Burtinshaw v. Gilbert*, Cowp. 49; *Goodright v. Glazier*, 4 Burr. 2512, Cowp. 87; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; *Lawson v. Morrison*, 2 Dall. (Pa.) 268, 1 L. Ed. 384, 1 Am. Dec. 288, 2 Am. Lead. Cas. 660 et seq.

⁸⁰ 3 Washburn, Real Prop. (6th Ed.) § 2448; 2 Min. Insts. 1049. And some statutes permit the issue of any devisee dying before the testator to take.

devisee can take no more than what was then intended for him, and hence a devise that lapses, or otherwise fails, goes to the testator's heir, and not to the residuary devisee.⁸¹

§ 1032. Probate and Recordation of Wills. The probate of a will is the official proof made before the proper and appointed tribunal of the due execution of the will, ascertaining it to be the genuine and lawful expression of the last wishes of the deceased in respect to his property, whereupon it is ordered to be recorded as and for the last will of the decedent, and the original is deposited and preserved in the clerk's office of the court of probate.

The student will observe that the construction of the will is not submitted to the court of probate. The sole subject for its consideration is whether the paper in question contains the last authentic expression of the decedent's wishes touching the disposition to be made of his property after his death, and whether the testator is competent to make such a will. The meaning of the paper, or whether it has any meaning at all, must be determined by other tribunals.

Wills of chattels must always be admitted to probate, in order to avail anything to the parties who claim under them. Until they thus receive the sanction of the proper court, they cannot be recognized in any court of law or equity.

But, as to a will of lands, probate is not indispensable to its validity. Such will may, in every case where there is occasion to use it in evidence, be formally proved to have been executed as the statute requires, and that will suffice (except as against bona fide purchasers of the land from the testator's heir, without notice of the will and for valuable consideration). But the will must be proved afresh in each case.⁸²

Considerations of expediency, however, require that a will of lands be probated—principally in order that the title may thus be made matter of record.

⁸¹ 2 Min. Insts. 1009; 4 Kent, Com. 540 et seq.; 2 Redfield, Wills, 115, 117, note 34; *Durour v. Motteux*, 1 Ves. Sr. 322; *Doe v. Underdown*, Willes, 296; *Cambridge v. Rous*, 8 Ves. 25; *Brown v. Higgs*, 4 Ves. 708, note b; *Jones v. Mitchell*, 1 Sim. & Stu. 294; *Prison Association v. Russell*, 103 Va. 563, 49 S. E. 966; *Van Kleeck v. Dutch Ref. Church*, 6 Paige (N. Y.) 600; *Id.*, 20 Wend. (N. Y.) 457.

⁸² 2 Min. Insts. 1031; 2 Bl. Com. 508; *Robinson*, Forms, 285.

CHAPTER XLI.

TITLE UNDER EXERCISE OF POWERS.

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§ 1033. I. The Nature of Powers in General. In the absence of restrictions imposed by the instrument creating an estate in land—which restrictions are regarded with more or less disfavor by the law¹—the power to aliene and dispose of one's interest in land is incident to the right of ownership itself.

¹ Ante, § 516 et seq.

But powers of disposition are frequently conferred upon persons, which are entirely out of proportion to their interests in the land, being conferred sometimes, indeed, upon persons who have no interest whatever in the land itself, but only the power to dispose of it or to name (or appoint, as the technical phrase is) the persons who shall take interests therein, or upon persons whose interests in the land would of themselves justify a very limited power of disposition, but who are given extraordinary powers in the exercise of which they may dispose of interests in the land greater than they themselves possess.

Thus, while it is a general principle of equity that one who purchases land from a trustee with notice of the trust is himself nothing more than a constructive trustee, holding the legal title for the benefit of cestui que trust,² yet cases frequently arise where a power of sale or of lease is given expressly or by implication to a trustee, in which case he may sell or lease the land to a purchaser, and the latter will take a good title, even though he has notice of the trust, not because of any inherent right of disposition in the trustee, but by reason of the power of sale or lease conferred upon him.³

Such a power is always conferred upon the trustee in a deed of trust to secure debts, and is of frequent occurrence in trusts for married women and other persons under disability, when the trust is an active trust and the trustee vested with considerable discretion.⁴ Instances of it are found quite often, also, in wills, where land is devised to the executor, with power to sell for the payment of debts or legacies, or for the best interests of the estate committed to his care; the executor in such cases holding the legal title to the land as a trustee.⁵

But powers are by no means confined to trustees. They are often to be found vested in tenants for life or of lesser estates, who may be authorized to convey or lease greater interests than they themselves possess; the general purpose being to enable the tenant to obtain terms of sublease, etc., more advantageous to himself and to the land than might be secured if he were confined to the disposition of his own interest alone.⁶

² Ante, § 434 et seq.

³ 1 Tiffany, Real Prop. § 276; *Collins v. Foley*, 63 Md. 158, 52 Am. Rep. 505; *Wentz's Appeal*, 106 Pa. 301.

⁴ *Walke v. Moore*, 95 Va. 729, 30 S. E. 374.

⁵ 1 Tiffany, Real Prop. §§ 273, 276; post, § 1047. So a power of appointment may be vested in one who already has the fee-simple estate for his own benefit. *Shearman v. Hicks*, 14 Grat. (Va.) 96.

⁶ 2 Min. Insts. 816.

Such powers as those mentioned in the two preceding paragraphs, where the power is given to one already possessing an interest in the land upon which the power is to be exercised, are known as "powers coupled with an interest," and are essentially different in some respects from a "naked" or "bare" power, to be exercised by one who has no title to, nor interest in, the land itself.⁷

A "naked" or "bare" power may be conferred upon one who has no interest whatever in the land itself, as where a testator, without devising the land to his executor, confers upon the latter by his will the power to sell the same for the payment of debts or legacies.⁸ So, also, if A. conveys or devises land to such persons as B. shall appoint by deed or will, B. possesses a "naked" or "bare" power. In such a case, B. though himself entitled to no estate in the land, has a general power of appointment or disposition, which could scarcely be greater if he owned the fee simple.⁹

§ 1034. Same—Definitions of Terms. A "power," in the sense here used, may be defined as a proprietary right in a person to create an estate or interest in the land or to impose a lien or charge thereon, which, when exercised, takes effect in diminution, derogation or destruction of the rights of others or of the person himself in the land, by reason of the power alone, without reference to the person's ownership of the estate.¹⁰

The creator of the power is usually designated the "donor of the power"; the person upon whom the power is conferred is the "donee of the power"; while the person in favor of whom a power of appointment is exercised is the "appointee," and the act of exercising it is the "appointment."¹¹

⁷ 1 Tiffany, Real Prop. § 279; *Godolphin v. Godolphin*, 1 Ves. Sr. 21; *Marlborough v. Godolphin*, 2 Ves. Sr. 60; *Loring v. Marsh*, 6 Wall. 337, 354, 18 L. Ed. 802; *Peter v. Beverly*, 10 Pet. 532, 9 L. Ed. 522; *Franklin v. Osgood*, 14 Johns. (N. Y.) 553; *Gray v. Lynch*, 8 Gill (Md.) 403. Powers of appointment, etc., coupled with an interest, are, however, to be carefully distinguished from powers of attorney (agency) coupled with an interest; the latter being of importance only in connection with the question whether the agency is revoked by the death of the principal, whereas a power of appointment, etc., conferring as it does a proprietary right, is usually irrevocable, whether coupled with an interest or not. See *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Sulphur Mines Co. v. Thompson*, 93 Va. 294, 25 S. E. 232. A brief discussion of powers of attorney to execute deeds will be found, ante, § 888.

⁸ 1 Tiffany, Real Prop. § 273.

⁹ Post, § 1035; *Freeman v. Butters*, 94 Va. 406, 26 S. E. 845.

¹⁰ 1 Tiffany, Real Prop. pp. 603, 604.

¹¹ 1 Tiffany, Real Prop. § 277.

§ 1035. II. The Scope of the Power—1. In Respect to the Appointees. Powers may be either general or special (or “particular” or “limited”). A power is general, if the donee is thereby authorized to dispose of any estate or interest in the land, and to any person whatsoever; while it is a special, particular or limited power if, by the instrument creating it, the appointment is restricted to particular persons or a particular class of persons, or is restricted as to the estates or interests in the land that may be created, or as to the purposes or conditions of its exercise.¹²

In the case of a general power, since there is no restriction upon the possible appointees, the donee of the power may name himself as the appointee.¹³ Should he do so, or should he appoint to a volunteer, the exercise of the power cuts off the rights of those to whom the estate is limited in default of appointment, and the land becomes subject to the donee’s debts, as if it were his own.¹⁴

But the mere potential right of the donee of the power to make himself the appointee, unless and until it is actually exercised in his own favor (or in favor of a volunteer), does not, at common law, constitute him the owner of the property or render it liable for his debts; for he may make no appointment at all, either to himself or to another, and until the power is exercised the person who is to take in default of appointment has at least an equal equity with the donee’s creditors and, in addition, the legal title.¹⁵

In the case of a special power, on the other hand, where the limitation upon the exercise of the power relates to the possible appointees, the appointment can be made only in favor of the specified person or persons, or the specified class of persons; for instance, a power given by will to B. to appoint among the testator’s children cannot be lawfully exercised by an appointment to his sons-in-law or grandchildren.¹⁶

A special power to appoint among a class of persons, such as children, may vest a discretion in the donee of the power to select among members of the class, in which case the power is termed

¹² 1 Tiffany, Real Prop. § 277.

¹³ 1 Tiffany, Real Prop. § 281; Hicks v. Ward, 107 N. C. 392, 12 S. E. 318, 10 L. R. A. 821; Beck’s Appeal, 116 Pa. 547, 9 Atl. 942.

¹⁴ Freeman v. Butters, 94 Va. 406, 26 S. E. 845.

¹⁵ Freeman v. Butters, 94 Va. 406, 26 S. E. 845; Holmes v. Coghill, 7 Ves. 499; Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908; Crawford v. Langmaid, 171 Mass. 309, 50 N. E. 606; Ryan v. Mahan, 20 R. I. 417, 39 Atl. 893; Gilman v. Bell, 99 Ill. 144.

¹⁶ 2 Min. Insts. 820; Smith v. Lord Camelford, 2 Ves. Jr. 698; Hudson v. Hudson, 6 Munf. (Va.) 356; Knight v. Yarbrough, Gilmer (Va.) 31; Morris v. Owen, 2 Call (Va.) 526; Austin v. Oakes, 117 N. Y. 577, 23 N. E. 193; Smith v. Hardesty, 88 Md. 387, 41 Atl. 788.

an "exclusive" power, because the donee has the power to exclude certain members of the class from participation in the appointment.¹⁷ But more usually, perhaps, the power is "nonexclusive"; that is, the donee is given no discretion nor authority to exclude any member of the class altogether, however it may be as to his authority to give unequal shares to the various members of the class. Instances of nonexclusive powers arise in case of powers to appoint "to" or "amongst" or "between" all the children of such a person, or "amongst the testator's sons in such shares as the donee shall determine," etc.¹⁸

§ 1036. **Same—The Doctrine of "Illusory Appointment."** In the case of nonexclusive powers, such as are described in the preceding section, the question sometimes arises as to the right of the donee to give a mere nominal share to one or more members of the class, or, in technical phrase, to make an "illusory appointment" to certain members of the class.

In England, independently of statute, the rule was established in equity that such an "illusory appointment" is invalid. It was never required, however, that there should be an equal distribution amongst the class, but only that a substantial share be allotted to each member; a large latitude of discretion being allowed the donee of the power.¹⁹ But this doctrine has now been abrogated in England by a statute which, in effect, authorizes a donee in all such cases to make an appointment excluding members of the class, if he sees fit to do so, unless a minimum share for each member of the class is mentioned in the original instrument creating the power.²⁰

In this country the former English doctrine with regard to illusory appointments generally obtains.²¹

¹⁷ 1 Tiffany, Real Prop. § 281; *Ingraham v. Meade*, 3 Wall. Jr. 32, Fed. Cas. No. 7,045; *Graeff v. De Turk*, 44 Pa. 527; *Hulwig v. Fenner*, 9 R. I. 410; *City of Portsmouth v. Shackford*, 46 N. H. 423.

¹⁸ 1 Tiffany, Real Prop. § 281; *Wilson v. Piggott*, 2 Ves. Jr. 351; *Knight v. Yarbrough*, Gilmer (Va.) 27; *Hudson v. Hudson*, 6 Munf. (Va.) 352; *Thrasher v. Ballard*, 35 W. Va. 524, 14 S. E. 232; *Hatchett v. Hatchett*, 103 Ala. 556, 16 South. 550; *Wright v. Wright*, 41 N. J. Eq. 382, note, 4 Atl. 855.

¹⁹ 2 Min. Insts. 820, 821; *Sugden, Powers*, 449, 938; 2 Th. Co. Lit. 590, note (B); *Butcher v. Butcher*, 1 Ves. & B. 79.

²⁰ 37 & 38 Vict. c. 37, § 1. An earlier English statute sanctioned illusory appointments. See *Gainsford v. Dunn*, L. R. 17 Eq. 405.

²¹ 2 Min. Insts. 820, 821; *McCamant v. Nuckolls*, 85 Va. 331, 12 S. E. 160; *Knight v. Yarbrough*, Gilmer (Va.) 27; *Thrasher v. Ballard*, 35 W. Va. 524, 14 S. E. 232; *Hatchett v. Hatchett*, 103 Ala. 556, 16 South. 550; *Cruse v. McKee*, 2 Head. (Tenn.) 1, 73 Am. Dec. 186; *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523. But in some of the states the donee is regarded as hav-

If the appointment be set aside as illusory, or for other cause, or if no appointment is made, the fund is to be distributed equally in equity among all the members of the class; the power of appointment in such case being in the nature of a trust.²²

§ 1037. Same—2. Scope of the Power in Respect to the Estates or Interests That may be Created. A power may be special (or particular or limited) by reason of restrictions imposed upon the donee with respect to the estate he may create, as well as with respect to the appointees.

In general, the terms in which the power is expressed will determine what kind and quantity of estate the donee may create; the tendency being towards liberality in the construction of the terms. Thus a power to divide property among the children of the donor of the power is held to confer a discretion upon the donee, and he is not bound to give a fee simple to each child, but may appoint to one for life, with a remainder or executory limitation to another.²³

So a power to appoint a fee-simple estate or a power in general terms will usually authorize an appointment of a freehold less than a fee simple,²⁴ or the creation of a mortgage.²⁵

So, also, a power to sell land (as in case of an executor or trustee) carries with it, without express mention, the power to make a conveyance of the land sold in fee simple to the purchaser.²⁶ But a mere power of sale, in the absence of evidence of a contrary intent on the part of the donor of the power, does not usually authorize a mortgage of the land;²⁷ nor does it authorize an exchange, but only a sale for money.²⁸

ing the right to make mere nominal appointments to some members of the class. *Graeff v. De Turk*, 44 Pa. 527; *Fronty v. Godard*, Bailey, Eq. (S. C.) 517; *Lines v. Darden*, 5 Fla. 51.

²² 2 Min. Insts. 821; 2 Th. Co. Lit. 590, 591.

²³ 1 Tiffany, Real Prop. § 281; Sugden, Powers, 682; *Beardsley v. Hotchkiss*, 96 N. Y. 201, 218. See *Lawrence's Estate*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925.

²⁴ 2 Min. Insts. 820; 1 Tiffany, Real Prop. § 281; *Bovey v. Smith*, 1 Vern. 84.

²⁵ 1 Tiffany, Real Prop. § 281; *Thwaytes v. Dye*, 2 Vern. 80; *Asay v. Hoover*, 5 Pa. 21, 45 Am. Dec. 713; *Hicks v. Ward*, 107 N. C. 392, 12 S. E. 318, 10 L. R. A. 821.

²⁶ 1 Tiffany, Real Prop. § 281; Sugden, Powers, 398; *Hemhauser v. Decker*, 38 N. J. Eq. 426.

²⁷ 1 Tiffany, Real Prop. § 281; Sugden, Powers, 425; 2 Perry, Trusts, § 768; *Hoyt v. Jaques*, 129 Mass. 286; *Ferry v. Laible*, 31 N. J. Eq. 566; *Bloomer v. Waldron*, 3 Hill (N. Y.) 361; *Butler v. Gazzam*, 81 Ala. 491, 1

²⁸ See note 28 on following page.

§ 1038. **Same—3. Scope of the Power in Respect to the Conditions and Purposes Thereof.** A power may also be special by reason of the restricted purposes or conditions for or upon which the power is to be exercised.

Thus, if there be a condition precedent to the exercise of the power it must be complied with, or else the power cannot be validly exercised. Hence, if a power of sale, such as that given to a trustee in a deed of trust to secure debts, is to be exercised only upon the request or with the assent of another, a sale without such request or assent is invalid.²⁹ So a power to sell land, when necessary for the support of a certain person, is not properly exercised if there be no such necessity.³⁰

So, also, a power in a trustee or executor to sell land for the payment of debts is not validly exercised if there are no debts to be paid.³¹

§ 1039. **III. The Several Sorts of Powers—1. Powers at Common Law.** It is in general repugnant to the common-law notions of conveyancing (which demanded that freehold estates in land should be created by livery of seisin) to permit the creation of estates by means of the exercise of a power, other than such as is merely inherent in the ownership of the land itself; and hence, so

South. 16; *McMillan v. Cox*, 109 Ga. 42, 34 S. E. 341; *Wilson v. Maryland Life Ins. Co.*, 60 Md. 150; *Stokes v. Payne*, 58 Miss. 614, 38 Am. Rep. 340; *Price v. Courtney*, 87 Mo. 387, 56 Am. Rep. 453. But it is otherwise if the design of the power of sale is to raise money for some particular purpose or to pay off charges upon the land. *Sugden, Powers*, 425; *Kent v. Morrison*, 153 Mass. 137, 26 N. E. 427, 10 L. R. A. 756, 25 Am. St. Rep. 616; *Faulk v. Dashiell*, 62 Tex. 642, 50 Am. Rep. 542; *Loebenthal v. Raleigh*, 36 N. J. Eq. 169; *Devaynes v. Robinson*, 24 Beav. 86.

²⁸ 1 *Tiffany, Real Prop.* § 281; 2 *Perry, Trusts*, § 769; *Woodward v. Jewell*, 140 U. S. 247, 11 Sup. Ct. 784, 35 L. Ed. 478; *Russell v. Russell*, 36 N. Y. 581, 93 Am. Dec. 540; *City of Cleveland v. State Bank*, 16 Ohio St. 236, 88 Am. Dec. 445.

²⁹ 1 *Tiffany, Real Prop.* § 285; *Sugden, Powers*, 252; *Richardson v. Crooker*, 7 Gray (Mass.) 190; *Gordon v. Gordon* (Tenn. Ch. App.) 46 S. W. 357.

³⁰ *Stevens v. Winship*, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; *Minot v. Prescott*, 14 Mass. 496; *Hull v. Culver*, 34 Conn. 403; *Scheidt v. Crecelius*, 94 Mo. 322, 7 S. W. 412, 4 Am. St. Rep. 384.

³¹ 1 *Tiffany, Real Prop.* § 285; *Sweeney v. Warren*, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468; *Hemphill v. Pry*, 183 Pa. 593, 38 Atl. 1020; *Moore v. Moore*, 41 N. J. Law, 440; *Ward v. Barrows*, 2 Ohio St. 242. But a purchaser, it seems, is not charged with notice of the nonexistence of debts, unless the power is so tardily exercised as to raise a presumption of the payment of the debts from lapse of time. 1 *Tiffany, Real Prop.* § 285; *Smith v. McIntyre*, 37 C. C. A. 177, 95 Fed. 585; *Rutherford v. Clark*, 4 Bush (Ky.) 27; *Doran v. Piper*, 164 Pa. 430, 30 Atl. 306; *Smith v. Henning*, 10 W. Va. 596.

far as freehold interests in land are concerned, the creation of them by the exercise of such powers was in the main unknown to the original common law,³² prior to the introduction of uses.

To this general rule there was, perhaps, one exception, in the case of a power given in a will to executors, authorizing them to sell lands for the payment of debts or legacies. Such powers did, indeed, exist at common law in those rare cases where land was devisable by the local custom of particular places;³³ and after the passage of the statute of wills (32 Hen. VIII, c. 1, explained by 34 Hen. VIII, c. 5), making lands devisable generally, the validity of such powers in wills continued to be recognized.³⁴ It is probable, however, that, instead of treating this kind of power as an exception to the general common-law principle, it should be classified, like other powers in wills, under the head of powers of appointment taking effect as executory limitations, presently to be described.³⁵

§ 1040. Same—2. Statutory Powers. Powers to aliene land are said to be "statutory," when they are conferred by statute. In such case, an alienation under the exercise of the power derives its effect from the statute, not from the instrument through or by which the alienation is made.³⁶

Instances of such powers may be found in the English statute conferring upon life tenants the power to make leases extending beyond their own lives,³⁷ or in the bankruptcy act of Congress, conferring upon the assignee in bankruptcy the power to sell the bankrupt's property.³⁸

§ 1041. Same—3. Powers Taking Effect as Executory Limitations or in Equity. One of the advantages of uses, as they existed in England prior to the statute of uses, was that they set at defiance the common-law rules flowing from the necessity of livery of seisin to create freehold estates, and permitted such estates (in the use) to spring up in futuro, without any preceding particular estate, or to shift from one to another upon the happening of some future contingency.³⁹

³² Ante, §§ 136, 399.

³³ Ante, §§ 6, 1003; 1 Tiffany, Real Prop. § 273; Co. Litt. 112b.

³⁴ 1 Tiffany, Real Prop. § 273; Co. Litt. 112b; *Townsend v. Walley*, Moore, 341.

³⁵ Post, § 1041.

³⁶ Sugden, Powers, 45; 1 Tiffany, Real Prop. § 274.

³⁷ 1 Tiffany, Real Prop. § 274.

³⁸ Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451); *Collier, Bankruptcy*, 454.

³⁹ Ante, § 399.

Among other methods of creating such future estates in uses were recognized appointments to future uses, whereby the grantor would convey land to a feoffee to hold to such uses as he (the feoffor) or another should appoint in the future by some designated method, as by deed or by will; the appointee, when thus designated, taking the use by virtue of the original feoffment to uses, and not by virtue of the deed or the will appointing him.

When the statute of uses⁴⁰ was passed, which converted uses into legal estates, this form of conveyance continued of frequent occurrence, with the same results, save that the appointee would thenceforward take a legal estate, where before he would have taken a mere use or equitable interest.⁴¹

A similar consequence flowed from the enactment of the statute of wills, five years later,⁴² so that thereafter land might be devised to vest in futuro according to the direction or "appointment" of a person named in the will.⁴³

In both these cases there is in effect an executory limitation to a person to be named in futuro; and upon an appointment by the donee of the power, the appointee takes an interest in the land, as if there had been an executory limitation to him in the original instrument creating the power. In other words, the deed, will or other instrument by or through which the donee exercises the power is not the appointee's source of title (which is to be found in the original instrument of the donor of the power), but is merely the vehicle or channel through which the appointee's claim to the property under the original instrument is assured.⁴⁴

Thus, one may convey land to A. and his heirs to such uses as A. (or B., or even the grantor himself) may appoint, and upon the making of the appointment in favor of C. and his heirs, the use, prior to the statute of uses, and since that statute (in England) the land itself, vests in C. in fee simple by way of springing limitation, just as if the original limitation had been to him; the fee resulting, until appointment, to the grantor or his heirs.⁴⁵

Similarly, A. may devise land to such persons and for such estates as B. may appoint, and if B. appoints to C. in fee or for

⁴⁰ 27 Hen. VIII, c. 10.

⁴¹ 2 Min. Insts. 817; 1 Tiffany, Real Prop. § 275.

⁴² 32 Hen. VIII, c. 1; 34 Hen. VIII, c. 5.

⁴³ 2 Min. Insts. 818; 1 Tiffany, Real Prop. § 275; Sugden, Powers, 199; *Townsend v. Walley*, Moore, 341.

⁴⁴ Post, § 1045; 2 Min. Insts. 821; Sugden, Powers, 31, 147, 196; 2 Th. Co. Lit. 590, note (B); *Doolittle v. Lewis*, 7 T. R. 48; *Jackson v. Davenport*, 20 Johns. (N. Y.) 551.

⁴⁵ 1 Tiffany, Real Prop. § 275.

life the estate named will vest in C. as by an executory devise under A.'s will.⁴⁶

It is to be observed, however, in accordance with the general rule, that if the future estate thus created by the exercise of the power of appointment can take effect as a remainder, it must do so, and thenceforward cannot be sustained as an executory limitation.⁴⁷

Where a future use is executed by the statute of uses, it is converted into a legal estate, and is good by way of an executory limitation; if unexecuted by the statute of uses, it remains a use or equitable estate; but in either event, the future estate is good, and is recognized in equity, if not at law; and so it is with other sorts of equitable estates. Hence we sometimes find future equitable estates created under the exercise of powers, which, while not taking effect strictly as executory limitations under the statutes of uses or wills, are nevertheless good, and governed by rules analogous to those controlling powers of appointment taking effect as executory limitations. These are usually designated "equitable" powers.⁴⁸

§ 1042. Same—Application of Rule against Perpetuities to Appointments under Powers. The rule against perpetuities is as fully applicable to executory limitations created by the exercise of a power as to other sorts of executory limitations. Whether such an executory limitation does violate the rule is to be determined in part by an examination of the terms of the instrument creating the power and in part by the terms of the instrument by or through which the power is exercised.

If, by the terms of the original instrument creating it, the power may by possibility be exercised at a period later than that prescribed by the rule, the power cannot be validly exercised at all; for the rule declares that the limitation is invalid unless it be so limited that it must necessarily vest, if at all, within a life or lives in being, ten months and twenty-one years thereafter.⁴⁹ Hence a power given to a life tenant, yet unborn, to appoint by will (or, it would seem, by deed), is void, since the appointment might be made at a time beyond the legal period.⁵⁰

⁴⁶ 1 Tiffany, Real Prop. § 275.

⁴⁷ Ante, § 674; 1 Tiffany, Real Prop. § 275; *Whitby v. Mitchell*, 42 Ch. Div. 494, 44 Ch. Div. 85.

⁴⁸ 2 Min. Insts. 818; 1 Tiffany, Real Prop. § 276; Sugden, Powers, 200.

⁴⁹ Ante, § 698; 1 Tiffany, Real Prop. § 294; Gray, Perpet. § 475; *Bristow v. Boothby*, 2 Sim. & S. 465; *Woodbridge v. Winslow*, 170 Mass. 388, 49 N. E. 738.

⁵⁰ *Morgan v. Gronow*, L. R. 16 Eq. 1.

Supposing the power to be one which, by the terms of its creation, must be exercised, if at all, within the time fixed by the rule against perpetuities, the question yet remains, in case it be exercised by the appointment of a future estate (measured from the date of the exercise of the power), whether the future estate thus created is valid under the rule against perpetuities, and at what time the computation of the period is to begin.

If the limitation in question be created under the exercise of a special power, the period fixed by the rule begins to run at the time of the creation of the power, not at the time of its exercise.⁵¹

But if the power be general, not restricted as to time, estate or objects, and exercisable either by conveyance or by will, this is equivalent, it is said, to absolute ownership, and its exercise is on the same footing as an original conveyance. Consequently the period fixed by the rule in such cases is to be computed from the time of the exercise of the power, and not from its creation.⁵²

§ 1043. Same—4. Powers of Revocation. Growing out of, and closely analogous to, powers of appointment taking effect as executory limitations are powers of revocation.

A power, to reside in the grantor, to revoke a common-law conveyance was deemed by the common law repugnant to the conveyance, and was never admitted.⁵³ But upon the introduction of uses, which comprised in essence merely the right to direct the person seised of the legal estate in what manner and to whom he should convey the land, it was concluded that there was no repugnancy in permitting the person creating the use to follow the bent of his will, and, if he reserved the power to revoke, to extend that indulgence to him accordingly; the Court of Chancery affecting great liberality in directing the uses according to the apparent intent of the parties. And that doctrine having been fully established prior to the statute of uses, and that statute proposing that *cestui que use*

⁵¹ 1 Tiffany, Real Prop. § 294; Gray, Perpet. § 514 et seq.; Sugden, Powers, 396; Lawrence's Estate, 136 Pa. 355, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925; In re Boyd's Estate, 199 Pa. 497, 49 Atl. 299; Thomas v. Gregg, 76 Md. 169, 24 Atl. 418. And if the power is to be exercised by will only, though it is general in point of appointees, estate, and conditions and purposes, it is regarded as a special power within the doctrine. See Gray, Perpet. §§ 526, 526b; In re Powell's Trusts, 39 L. J. Ch. 188; Lawrence's Estate, supra; Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91. But see Rous v. Jackson, 29 Ch. Div. 521; In re Flower, 55 L. J. Ch. 200.

⁵² 1 Tiffany, Real Prop. § 294; Gray, Perpet. § 524; Bray v. Bree, 2 Cl. & F. 453; Mifflin's Appeal, 121 Pa. 205, 15 Atl. 525, 1 L. R. A. 453, 6 Am. St. Rep. 781; Lawrence's Estate, 136 Pa. 355, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925.

⁵³ 2 Min. Insts. 815.

should have the land as before he had the use, the legal estate thus created under the statute of uses has always been deemed revocable, if the right to revoke is reserved, in like manner as the use had been before.⁵⁴

By means of a power of this sort the grantor of an estate may reserve to himself, or even to a third person, the power to revoke the grant, and to limit new uses in lieu thereof; as in case of a conveyance by A. to the use of B. and his heirs, reserving a power in A. to revoke the use thus limited, in which case B.'s estate in fee will terminate on the exercise of such power.⁵⁵ And so, in case of a devise to T. and his heirs to his own use for his life, and after his death to the use of C. and his heirs, but with power in T., by deed or will, to revoke the use in favor of C. and his heirs, and to limit new uses in lieu thereof, in which case C.'s interest terminates upon the exercise of T.'s power of revocation, and the fee shifts over to T.'s appointees.⁵⁶

§ 1044. Same — 5. Powers Arising by Implication. Powers sometimes arise merely by implication from the language used in a conveyance or will. Thus, in case of a trustee or executor appointed by will, a power to sell land, though not expressly given by the will, may be implied from its provisions, if they impose upon him duties as to the distribution of the estate, to the performance of which a power of sale is essential;⁵⁷ for example, when he is required by the will to divide the estate among certain persons, and the estate is not divisible in kind.⁵⁸

So, also, in some jurisdictions at least, a power of disposition is implied in a life tenant, by reason of a limitation over to another of "what remains undisposed of" by such life tenant at his or her death, in which case the first taker takes merely a life estate, coupled with a power of appointment of the reversion, and in default of appointment to the second takers.⁵⁹

⁵⁴ 2 Min. Insts. 815; Gilbert, Uses, 313, 158, 159, note (5).

⁵⁵ 2 Min. Insts. 815 et seq.; 1 Tiffany, Real Prop. § 275; Sugden, Powers, 363, 478; Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908; Riggs v. Murray, 2 Johns. Ch. (N. Y.) 565; Reidy v. Small, 154 Pa. 505, 26 Atl. 602, 20 L. R. A. 362.

⁵⁶ 2 Min. Insts. 815; Sugden, Powers, 106 et seq.; Gilbert, Uses, 314 et seq.

⁵⁷ 1 Tiffany, Real Prop. § 280; 2 Perry, Trusts, § 766; Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Lindley v. O'Reilly, 50 N. J. Law, 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802; Belcher v. Belcher, 38 N. J. Eq. 126; Winston v. Jones, 6 Ala. 550; Vaughan v. Farmer, 90 N. C. 607.

⁵⁸ Corse v. Chapman, 153 N. Y. 466, 47 N. E. 812; Tomkins v. Miller (N. J.) 27 Atl. 484.

⁵⁹ 1 Tiffany, Real Prop. § 280; Clark v. Middlesworth, 82 Ind. 240; Paine v. Barnes, 100 Mass. 470; Smith v. McIntyre, 37 C. C. A. 177, 95 Fed. 585:

§ 1045. **IV. The Exercise of the Power—1. Effect of Proper Exercise of Power.** It is a well-established principle that when the donee of a power of appointment exercises the power and appoints one to take under it, the appointee holds, not under the donee of the power, but under the donor, that is, under the instrument executed by the donor which creates the power; the intermediate seisin of the donee of the power under the same instrument, if any, being wholly defeated by the appointment.⁶⁰

If, however, the conveyances creating the power of appointment is a bargain and sale or covenant to stand seised under the statute of uses, there is perhaps a question whether the appointee, who has not supplied the valuable consideration or is not related to the donor of the power, is within the consideration so as to permit him to take the interest arising after the appointment under the donor's deed.⁶¹

We have already seen instances of the application of the principles that an appointee under a power takes under the donor and not under the donee. Thus it has been shown that the dower of H.'s wife is defeated in case of a conveyance "to such uses as H. shall appoint, and until such appointment to the use of H. and his heirs," in case H. (even without the joinder of his wife) should appoint in his lifetime.⁶² So, also, though the rule in *Shelley's Case* is applicable only where the ancestor's freehold and the remainder to the heirs, etc., are limited by the same instrument, yet in accordance with the same principle, if there be a limitation "to the use of A. for life, and after his death to such uses as Z. shall appoint," and Z., in A.'s lifetime, appoints the use to the heirs of A., it is the same as if the original instrument had limited the estate in the first instance to the heirs of A. by way of remainder

Roberts v. Lewis, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747; *Henderson v. Blackburn*, 104 Ill. 227, 44 Am. Rep. 780. See *Smythe v. Smythe*, 90 Va. 638, 19 S. E. 175. But it is usually held that where an estate is given to one generally (e. g. "to A."), with a power of disposition implied by a limitation over of "what remains undisposed of," or the like words, it creates a fee simple in the first taker, as a matter of the construction of the grantor's or testator's intent. *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747; *Id.*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579.

⁶⁰ Ante, § 1041; 2 Min. Insts. 169; *Ray v. Pung*, 5 B. & Ald. 561; *Maundrell v. Maundrell*, 10 Ves. 263 et seq.; *Paine's Case*, 8 Co. 34b, n. (A); *Cunningham v. Moody*, 1 Ves. Sr. 177; *Doe v. Martin*, 4 T. R. 65; *Doe v. Weller*, 7 T. R. 478; *Venables v. Morris*, 7 T. R. 342, 347; *Roach v. Wadham*, 6 East, 289.

⁶¹ 2 Min. Insts. 170; *Gilbert, Uses*, 398, note (2), Introduction, lv; 1 *Spence, Eq. Jur.* 450, 451.

⁶² Ante, § 275.

after A.'s life estate, so that the rule in *Shelley's Case* applies at common law.⁶³

And so, if land be leased to W. with power of appointment, and with a covenant by W. and his assigns to pay the rent, and W. appoints to J., the appointee cannot be sued by the original lessor upon W.'s covenant to pay rent because, since J. does not hold under W., but under the original donor of the power, there is no privity of estate between W. and J., such as is required to constitute a covenant running with the land.⁶⁴

§ 1046. Same—2. Powers Coupled with a Trust—Exercise of Power Mandatory. The donee of a power, strictly so called, can never be compelled to exercise the power; it being in the nature of a privilege or right, the exercise of which is optional and discretionary with the donee.⁶⁵

But sometimes what is really a trust is appareled in the garb of a power, in which case a court of chancery will compel the execution of the so-called power. Such a power is denominated "a power coupled with a trust," or "a power in the nature of a trust," and arises in cases where the execution of the power is imposed upon the donee as an imperative duty, admitting no exercise of discretion on his part. Thus, if a power of sale be given by will to the executor therein named, with specific directions to apply the proceeds for the benefit of certain persons, or to pay certain debts, this would be a power coupled with a trust, the specific execution of which chancery would enforce.⁶⁶

The nonexecution of such a power is aided in equity on the same principle upon which courts of equity enforce any trust; and if the donee fails or refuses to exercise the power, or dies without exercising it, the court of equity will itself exercise it, so far as it can. In such case, if the power be for the benefit of a class of persons (as "children," "sons," etc.), though the donee might have had the right to exercise a discretion in the selection of the members of the class who should benefit thereby, yet if he fails or re-

⁶³ Ante, § 631; 2 Min. Insts. 407; *Fearne*, Rem. 74; *Venables v. Morris*, 7 T. R. 342, 347.

⁶⁴ *Roach v. Wadham*, 6 East, 289. See ante, § 376.

⁶⁵ 1 *Tiffany*, Real Prop. § 278; *Sugden*, Powers, 588; 2 *Story*, Eq. Jur. § 1061; 1 *Perry*, Trusts, § 248; *Dillard v. Dillard*, 97 Va. 442, 34 S. E. 60.

⁶⁶ *Sugden*, Powers, 588; *Brown v. Higgs*, 8 Ves. 561; *Faulkner v. Davis*, 18 Grat. (Va.) 651, 98 Am. Dec. 698; *Greenough v. Welles*, 10 Cush. (Mass.) 571; *Bailey*, Petitioner, 15 R. I. 60, 1 Atl. 131; *Druid Park Heights Co. of Baltimore City v. Oettinger*, 53 Md. 46; *Randolph v. East Birmingham L. Co.*, 104 Ala. 355, 6 South. 126, 53 Am. St. Rep. 64; 1 *Tiffany*, Real Prop. § 278; 2 *Story* Eq. Jur. § 106; 1 *Perry*, Trusts, c. 8.

fuses to exercise the power, and the court of equity is called upon to enforce an execution thereof, the court has no authority to exercise such discretion, but must enforce it in favor of all the members of the class equally, upon the maxim that equality is equity.⁶⁷

In such cases of powers coupled with a trust, that is, powers to appoint among a certain class of persons, where the donee has failed to appoint, it sometimes becomes necessary for the court of equity, in ascertaining the share of each member of the class, to determine whether each member of the class takes a vested interest in the property from the date of the original instrument creating the trust (in which case, the heirs, devisees or assignees of any deceased member of the class may be assigned by the court the portion that would have gone to the deceased member, had he been living at the date of the distribution), or whether the intent of the donor of the power is that the property should go only to such members of the class as might have taken it if the power were properly exercised by the donee thereof.

Such a question would arise in case of a power given to A. to appoint by last will among a class, such as the testator's children. If A. fails to appoint by will, and some of the children of the testator have died during A.'s lifetime, leaving children, the court must determine whether the latter children are to be included in the distribution of the fund, taking their parent's portion, or are to be excluded, leaving the fund to be distributed among those members of the class named (the testator's children) who are living at the time of A.'s death (when the power was to be exercised).

If the instrument creating the power contains an express gift to the class, accompanied by a power in another to determine the shares in which they shall take, the court of equity regards the gift as vested in all the members of the class from the beginning, and therefore the heirs or devisees of the dead members of the class will be given the portions that would have gone to the deceased members, had they continued alive until the distribution.⁶⁸

But if the instrument creating the power does not expressly give the property to the class, but merely confers a power upon the donee to appoint among the class, the presumption is that only

⁶⁷ 2 Min. Insts. 821; 1 Perry, Trusts, §§ 250, 255; *Lambert v. Thwaites*, L. R. 2 Eq. 151; *Brown v. Higgs*, 8 Ves. 561; *Parsons v. Baker*, 18 Ves. 476; *Morris v. Owen*, 2 Call (Va.) 520; *Tomlinson v. Nickell*, 24 W. Va. 148; *Withers v. Yeadon*, 1 Rich. Eq. (S. C.) 324.

⁶⁸ *Lambert v. Thwaites*, L. R. 2 Eq. 151; *Casterton v. Sutherland*, 9 Ves. 445; *Wilson v. Duguid*, 24 Ch. Div. 244; *Rhett v. Mason*, 18 Grat. (Va.) 541; *Carson v. Carson*, 62 N. C. 57; 1 Tiffany, Real Prop. § 290. See post, § 1052.

such members of the class are to take as could have taken if the power had been exercised by the donee himself, so that if he is to appoint among "children" by will (without an express gift to the "children"), since he can only appoint among the children, and not among the grandchildren, the donee would be confined in his appointment by will to such of the children as are living at his death, and the court, in its distribution, would be confined to the same persons.⁶⁹

§ 1047. **Same—3. Delegation of the Power.** It is a general maxim of the law, applicable to all cases where a discretion has been vested by one person in another, that the exercise of a discretionary authority cannot be delegated (*delegatus non potest delegare*).

In the absence of proof of a contrary intent in the creation of the power, this principle is in general applicable to powers of all sorts, not "coupled with an interest," except in the case of a "power coupled with a trust," in which case there is no discretion vested in the donee, but the exercise of the power is imperative, as has just been shown.⁷⁰

In general, since the gift of a power implies a personal trust and confidence, it cannot be transferred or delegated to another, unless a right of transfer or delegation is expressly conferred or necessarily implied.⁷¹ Thus the donee of a special power cannot exercise it by appointing to another a life estate, with power to such life tenant to appoint in remainder.⁷²

But this principle has no application to cases where there is no discretion, on the one side, or, upon the other, where there is no relation of trust or confidence. Hence a power in the nature of a trust—an imperative power, admitting of no discretion in the donee—whether given to the donee personally, or as trustee or executor, will be enforced in equity, if the donee, or one of the donees, refuses to execute it, or dies without having done so, or in any other case of its nonexecution.⁷³

⁶⁹ 1 Tiffany, Real Prop. § 290; *Lambert v. Thwaites*, L. R. 2 Eq. 151; *Walsh v. Wallinger*, 2 Russ. & M. 78; *Kennedy v. Kingston*, 2 Jac. & W. 431. See post, § 1052.

⁷⁰ Ante, § 1046.

⁷¹ 1 Tiffany, Real Prop. § 282; *Sugden, Powers*, 179; 4 Kent, Com. 327; *Ingram v. Ingram*, 2 Atk. 88; *Hood v. Haden*, 82 Va. 588; *Shelton v. Homer*, 5 Mete. (Mass.) 462; *Keim v. O'Reilly*, 54 N. J. Eq. 418, 34 Atl. 1073; *Phillips v. Brown*, 16 R. I. 279, 15 Atl. 90; *Wilson v. Mason*, 158 Ill. 304, 313, 42 N. E. 134, 49 Am. St. Rep. 162; *Saunders v. Webber*, 39 Cal. 287.

⁷² *Hood v. Haden*, 82 Va. 588; *Wickersham v. Savage*, 58 Pa. 365.

⁷³ Ante, § 1046; *Brown v. Higgs*, 8 Ves. 561; *Gibbs v. Marsh*, 2 Mete. (Mass.) 243; *Greenough v. Welles*, 10 Cush. (Mass.) 571; *Franklin v. Os-*

On the other hand, if the power is general, unrestricted as to the beneficiaries and the manner of its exercise, since there is no relation of trust or confidence established, and the power is equivalent to ownership, the donee may delegate the exercise of it, or may appoint to such uses as another shall appoint.⁷⁴

Still another exception, or apparent exception, to the principle that the right to exercise a power cannot be delegated, arises in the case of power conferred upon trustees, executors, or other fiduciaries, in their official, and not in their personal, capacities. This exception, if such it may be called, is grounded in the intention of the creator of the power, and is based upon the fact that, in such cases, the trust or confidence is reposed in the official, and not in the person; and his successor in office has the same claim to be trusted and to execute the power as had the official to whom it was originally given. Hence, in case of a power given to a trustee, where it appears from the terms of the instrument creating the power that it is attached to the official merely, it may be exercised by a substituted trustee in the event of the death, resignation or removal of the original trustee.⁷⁵ But if there is a personal discretion involved in the exercise of the power, only the original trustee may exercise it, and neither his assignee, heirs, personal representative, nor a substituted trustee can do so, in the absence of statute.⁷⁶

If a sole executor, to whom the will gives a power of sale, should refuse to qualify, or should resign or die, the administrator c. t. a., in the absence of an intent to the contrary, or of a statute authorizing it, cannot exercise the power.⁷⁷

good, 14 Johns. (N. Y.) 527; *Gosson v. Ladd*, 77 Ala. 223; *Dick v. Harby*, 48 S. C. 516, 26 S. E. 900; *Robertson v. Gaines*, 2 Humph. (Tenn.) 367.

⁷⁴ 1 Tiffany, Real Prop. § 282; *Sugden, Powers*, 181, 195. See *Coats v. Louisville & N. R. Co.*, 13 Ky. Law Rep. 557, 17 S. W. 564; *Dillard v. Dillard* (Va.) 21 S. E. 669.

⁷⁵ 1 Tiffany, Real Prop. § 282; 2 Perry, Trusts, § 503; *Bradford v. Monks*, 132 Mass. 405; *Boutelle v. Bank*, 17 R. I. 781, 24 Atl. 838; *Druid Park Heights Co. of Baltimore City v. Oettinger*, 53 Md. 46; *Safe Deposit & Trust Co. of Baltimore v. Sutro*, 75 Md. 361, 23 Atl. 732; *Freeman v. Prendergast*, 94 Ga. 369, 21 S. E. 837. See, also, post, § 1048.

⁷⁶ 1 Tiffany, Real Prop. § 282; *Cole v. Wade*, 16 Ves. 27; *Gosson v. Ladd*, 77 Ala. 223; *Young v. Young*, 97 N. C. 132, 2 S. E. 78; *Gambell v. Trippe*, 75 Md. 252, 23 Atl. 461, 15 L. R. A. 235, 32 Am. St. Rep. 388; *Security Co. v. Snow*, 70 Conn. 288, 39 Atl. 153, 66 Am. St. Rep. 107. See *Dillard v. Dillard*, 97 Va. 442, 34 S. E. 60.

⁷⁷ 1 Tiffany, Real Prop. § 282; 2 Perry, Trusts, § 500; *In re Clay*, 16 Ch. Div. 3; *Tainter v. Clark*, 13 Metc. (Mass.) 220; *Conklin v. Egerton*, 21 Wend. (N. Y.) 429. In the case of a devise of land to the executor to be sold, etc., the executor takes an interest in the land, not a mere power of

§ 1048. **Same—4. Exercise of the Power in Case of Several Joint Donees.** In general, the assumption of the law is that, when a power is given to several donees jointly, it is the donor's intention to repose his confidence in them all jointly, and not to trust to the individual discretion of each, or to that of any less than the whole number. Hence, unless a contrary intent is shown by the instrument creating the power, or it is otherwise declared by statute, the general rule is that, where a "bare" or "naked" power is given to two or more donees jointly, they must all unite in the exercise thereof;⁷⁸ and the death or refusal of one or more of the donees to act will prevent the valid exercise of the power.⁷⁹

But if the power, though "naked," be given to persons in an official capacity, rather than personally, as in the case of a power of sale given to joint executors, it seems that the power may be exercised by less than the whole number, if some of them die, or refuse to qualify.⁸⁰

On the other hand, if the power is not a "bare" or "naked" power, but one "coupled with an interest"⁸¹ (that is, when the power is conferred upon persons who are also given the title, as in the case of land devised to trustees or executors, with a power of sale), since, upon the death of one of the joint tenants of the title, the estate at common law survives, so also does the power.⁸²

Indeed, in case of powers coupled with an interest, not only is it permissible for less than the whole number of donees, trustees or executors to exercise the power upon the death of one or more

sale, and he takes it as a trustee, and not as an executor. *Mosby v. Mosby*, 9 Grat. (Va.) 590, 611.

⁷⁸ 1 Tiffany, Real Prop. § 282; 1 Perry, Trusts, § 294; 2 Story, Eq. Jur. § 1062; *McRae v. Farrow*, 4 Hen. & M. (Va.) 444.

⁷⁹ 1 Tiffany, Real Prop. § 282; 2 Perry, Trusts, §§ 499, 505. See *Lane v. Debenham*, 11 Hare, 188; *Peter v. Beverly*, 10 Pet. 532, 564, 9 L. Ed. 522; *Parker v. Sears*, 117 Mass. 513; *Tainter v. Clark*, 13 Metc. (Mass.) 220; *Osgood v. Franklin*, 14 Johns. (N. Y.) 527; *Conklin v. Egerton*, 21 Wend. (N. Y.) 430; *Robinson v. Allison*, 74 Ala. 254; *Muldrow v. Fox*, 2 Dana (Ky.) 79; *Gray v. Lynch*, 8 Gill (Md.) 403; *Gutman v. Buckler*, 69 Md. 7, 13 Atl. 635.

⁸⁰ 1 Tiffany, Real Prop. § 282; Sugden, Powers, 128; *Howell v. Barnes*, Cro. (Car.) 382; *Nelson v. Carrington*, 4 Munf. (Va.) 332, 6 Am. Dec. 519; *Peter v. Beverly*, 10 Pet. 532, 564, 9 L. Ed. 522; *Bradford v. Monks*, 132 Mass. 405; *In re Murphy's Estate*, 184 Pa. 310, 39 Atl. 70, 63 Am. St. Rep. 802; *Fitzgerald v. Standish*, 102 Tenn. 383, 52 S. W. 294; *Weimar v. Fath*, 43 N. J. Law, 1. But see *Jones v. Hobson*, 2 Rand. (Va.) 499.

⁸¹ Ante, § 1033.

⁸² See authorities cited supra. See also, *Deneale v. Morgan*, 5 Call (Va.) 407; *Gould v. Mather*, 104 Mass. 283; *Wilder v. Ranney*, 95 N. Y. 7; *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162.

of them, but an exercise of the power by the rest of the number is equally permissible where one (or more) refuses to qualify, is removed, or resigns.⁸³

But if all the executors refuse to qualify, resign, die, or are removed, the administrator c. t. a. is not at common law permitted to exercise the power in their stead, though it is otherwise in the case of the substitution of one set of trustees by another—at least, when the confidence has been reposed in them officially, and not personally.⁸⁴

§ 1049. **Same—5. Manner of Exercising the Power.** It is a general rule that all the forms and circumstances prescribed by the instrument creating the power must be strictly observed, including whatever limitations may exist as to the time of execution, the mode of execution, the persons who are to exercise the power, the persons who are to take, and the shares to be allotted to them severally.⁸⁵

Thus, though the execution of powers defective in merely formal points may sometimes be aided in a court of equity,⁸⁶ yet in a court of law if the particular instrument whereby the power is to be executed is specified it must be adopted; so that, if a deed be required, a will does not suffice, and, if a will is prescribed, the execution of the power by deed is void, unless the deed is in its nature testamentary, in which event the mere fact that it is in the form of a deed will not invalidate it.⁸⁷

On the other hand, nothing need be added to the requirements. Hence, if a writing under hand and seal is required, it need not be delivered; and, if required to be “duly attested,” it suffices if there be one witness.⁸⁸

So, independently of statute, whatever number of witnesses be required, that number must be had, although exceeding the limit usually necessary; and in like manner, if a less number be required by the instrument creating the power, a less number will suffice.

⁸³ 1 Tiffany, Real Prop. § 282; *Warden v. Richards*, 11 Gray (Mass.) 277; *Gould v. Mather*, 104 Mass. 283; *Weimar v. Fath*, 43 N. J. Law, 1; *Denton v. Clark*, 36 N. J. Eq. 534; *Meakings v. Cromwell*, 5 N. Y. 136; *Heron v. Hoffner*, 3 Rawle (Pa.) 393; *Chanet v. Villeponteaux*, 3 McCord (S. C.) 29; *Wolfe v. Hines*, 93 Ga. 329, 20 S. E. 322.

⁸⁴ Ante, § 1047.

⁸⁵ 2 Min. Insts. 818, 819; 2 Th. Co. Lit. 587, note (B); *Hawkins v. Kent*, 3 East, 410; 1 Sugden, Powers, 211, 250, 278.

⁸⁶ Post, § 1054.

⁸⁷ 2 Min. Insts. 819; 2 Th. Co. Lit. 587, note (B); *Wilks v. Burnis*, 60 Md. 64; *Gaskins v. Finks*, 90 Va. 384, 19 S. E. 166.

⁸⁸ 2 Min. Insts. 819; 2 Th. Co. Lit. 588, note (B); *Sherman v. Hicks*, 14 Grat. 96; *Wright v. Wakeford*, 17 Ves. 454a.

But if the power is to be executed "by will" (without more) the rule is that the will must be made as the statute of wills requires;⁸⁹ and if the instrument creating the power contains no restrictions, express or implied, upon the mode of execution, it may be exercised by any instrument sufficiently showing an intent to execute it, provided at least it would suffice to pass title to the property if it belonged to the donee of the power.⁹⁰

It is noteworthy that a will made in execution of a power not only so operates, but has in most respects the qualities of a proper will. Thus it is ambulatory until the testator's death, and may be revoked, as, of course, without reserving a power of revocation, as is necessary where the power is executed by deed. So the appointment lapses by appointee's death in testator's lifetime (unless where a statute may prevent), and confers no interest in any case except from his death.⁹¹

The instrument by which the power is executed need not recite the power, and it will be good, although it includes other subjects, the property of the appointor. And notwithstanding the power may have contemplated but one instrument, yet if several be employed, which in effect are but one, it suffices.⁹²

§ 1050. Same—6. The Exercise of a Power is a Question of the Donee's Intention. It is not essential at common law that the donee of the power, in executing it, should recite the power or refer to it in any manner, provided there be an actual or legal intent to exercise it. Such an intent may, at common law, be shown in three ways—either (1) by specific reference to the power itself; (2) by specific reference to the property which is the subject of the power; or (3) by reason of the fact that the donee's act would be ineffectual unless considered as an exercise of the power.⁹³

Thus, if the donee of a naked power over certain land conveys

⁸⁹ 2 Min. Insts. 819; 2 Th. Co. Lit. 588, note (B); *Longford v. Eyre*, 1 P. Wms. 700.

⁹⁰ *Knight v. Yarborough*, 4 Rand. (Va.) 566; *Cueman v. Broadnax*, 37 N. J. Law, 508; *Christy v. Pulliam*, 17 Ill. 59; *Sugden, Powers*, 203; 2 Min. Insts. 819.

⁹¹ 2 Min. Insts. 820; 2 Th. Co. Lit. 588, 589, note (B). But if one by will gives a donee power to appoint, the donee may exercise the power in the lifetime of the testator who created the power, and such exercise will be valid to pass the estate at the death of the donor, if his will remains unrevoked. *Thorndike v. Reynolds*, 22 Grat. (Va.) 27, 28.

⁹² Post, § 1050; 2 Min. Insts. 820; 2 Th. Co. Lit. 589, note (B); *Walke v. Moore*, 95 Va. 735, 736, 30 S. E. 374.

⁹³ *Walke v. Moore*, 95 Va. 735, 736, 30 S. E. 374; *Hood v. Haden*, 82 Va. 594; *Lee v. Simpson*, 134 U. S. 572, 590, 10 Sup. Ct. 631, 33 L. Ed. 1038; *Den v. Roake*, 6 Bing. 475.

or devises the specific land, since he has no estate in the land upon which the conveyance or devise may operate, it must be regarded as intended as an exercise of the power, for else it could have no operation at all.⁹⁴ And even though the donee have an estate in the land, if the interest given under the execution of the power be greater, this points to the donee having in mind the exercise of the power, which, it seems, will be conclusively presumed, though in fact the donee believes he is conveying or devising his own property, and is not aware that he has a power merely to dispose of the greater estate.⁹⁵ Thus the conveyance of a fee by one who has a life estate, with power over the fee, is an exercise of the power.⁹⁶ But if the interest disposed of is no greater than the estate the donee of the power has in the land itself, the general presumption is that his transfer is intended to operate upon his own interest, and not under the power.⁹⁷

If the donee's conveyance or devise does not refer specifically either to the power or to the particular land, but uses general expressions descriptive of land or interests therein, which may or may not embrace the land subject to the power, such as "all my land," "all the residue of my land," "my leasehold property," etc., and the donee of the power owns no interest in land to which such expressions can refer, his conveyance or will must be regarded as intended to be an exercise of the power, since otherwise it would be in-

⁹⁴ 1 Tiffany, *Real Prop.* § 283; Sugden, *Powers*, 289, 290; *Clere's Case*, 6 Co. 17b; *Scrope's Case*, 10 Co. 143b; *Hood v. Haden*, 82 Va. 588; *Taylor v. Eatman*, 92 N. C. 601; *Scott v. Bryan*, 194 Pa. 41, 45 Atl. 135; *Matthews v. McDade*, 72 Ala. 377; *Terry v. Rodahan*, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420; *Dick v. Harby*, 48 S. C. 516, 26 S. E. 900.

⁹⁵ 1 Tiffany, *Real Prop.* § 283; Sugden, *Powers*, 348; *Walke v. Moore*, 95 Va. 736, 30 S. E. 374; *Hood v. Haden*, 82 Va. 594; *Allison v. Kurtz*, 2 Watts (Pa.) 185; *Drusadow v. Wilde*, 63 Pa. 172; *Terry v. Rodahan*, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420; *Young v. Mutual Ins. Co.*, 101 Tenn. 311, 47 S. W. 428; *Bishop v. Remple*, 11 Ohio St. 282; *Yates v. Clark*, 56 Miss. 212; *Baird v. Boucher*, 60 Miss. 326; *Gindrat v. Montgomery Gas Light Co.*, 82 Ala. 596, 2 South. 327, 60 Am. Rep. 769; *Farlow v. Farlow*, 83 Md. 118, 34 Atl. 837; *Owen v. Ellis*, 64 Mo. 77; *Warner v. Conn. Mut. Life Ins. Co.*, 109 U. S. 357, 3 Sup. Ct. 221, 27 L. Ed. 962.

⁹⁶ *Walke v. Moore*, 95 Va. 729, 30 S. E. 374; *Warner v. Conn. Mut. Life Ins. Co.*, 109 U. S. 357, 3 Sup. Ct. 221, 27 L. Ed. 962; *Gindrat v. Montgomery Gas Light Co.*, 82 Ala. 596, 2 South. 327, 60 Am. Rep. 769; *Law Guarantee & Trust Co. v. Jones*, 103 Tenn. 245, 58 S. W. 219; *Baird v. Boucher*, 60 Miss. 326.

⁹⁷ 1 Tiffany, *Real Prop.* § 283; *Clere's Case*, 6 Co. 17b; *Den v. Roake*, 6 Bing. 475; *Walke v. Moore*, 95 Va. 729, 30 S. E. 374; *Robeno v. Marlatt*, 136 Pa. 35, 20 Atl. 512; *Mutual Life Ins. Co. of New York v. Shipman*, 119 N. Y. 324, 24 N. E. 177; *Phillips v. Brown*, 16 R. I. 279, 15 Atl. 90; *Payne v. Johnson*, 95 Ky. 175, 24 S. W. 238, 609; *Towles v. Fisher*, 77 N. C. 437.

effectual and a mere nullity.⁹⁸ But if the donee owns other interests in lands, to which these expressions may be held to refer, the better rule, independently of statute, is that such a general conveyance or devise does not show an intent to execute the power, and will be confined in its operation to the interests actually owned by the donee.⁹⁹

§ 1051. **Same—7. Time of Exercise of Power.** The construction of the original instrument creating the power will usually determine whether time is to be regarded as of the essence of the power; the general rule being that, if the power is already existing, its exercise is valid, though taking place beyond the time fixed for its exercise, the provision as to the time within which the power is to be exercised being usually regarded as directory only, and not mandatory. Such, at least, is the general rule in case of powers coupled with an interest, as where a power of sale is conferred upon trustees, or where land is devised to executors with power to sell.¹

On the other hand, if the instrument creating the power provides that it is not to come into existence until some future event, and such future event has not yet transpired when the power is exercised, the premature exercise thereof is at least inoperative until the happening of such future event, if not totally void.²

Upon this principle, if a power to sell land in which another has a life estate be given to a trustee or executor, the power can-

⁹⁸ 1 Tiffany, Real Prop. § 283; Sugden, Powers, 318; Standen v. Standen, 2 Ves. Jr. 589; Grant v. Lyman, 4 Russ. 292; Keefer v. Schwartz, 47 Pa. 503; Mory v. Michael, 18 Md. 227; Smith v. Curtis, 29 N. J. Law, 352. See Machir v. Funk, 90 Va. 287, 18 S. E. 197.

⁹⁹ 1 Tiffany, Real Prop. § 283; Sugden, Powers, 312; Den v. Roake, 6 Bing. 475; Bingham's Appeal, 61 Pa. 345; Mason v. Wheeler, 19 R. I. 21, 31 Atl. 426, 61 Am. St. Rep. 734; Cotting v. De Sartiges, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367; Sewall v. Wilmer, 132 Mass. 131; Hollister v. Shaw, 46 Conn. 248; Meeker v. Breintnall, 38 N. J. Eq. 345; Patterson v. Wilson, 64 Md. 193, 1 Atl. 68; Bilderback v. Boyce, 14 S. C. 528.

¹ Tiffany, Real Prop. § 284; Pearce v. Gardner, 10 Hare, 257; Jackson v. Ligon, 3 Leigh (Va.) 161; Hale v. Hale, 137 Mass. 168; Mott v. Ackerman, 92 N. Y. 539; Marsh v. Love, 42 N. J. Eq. 112, 6 Atl. 889; Shalter's Appeal, 43 Pa. 83, 82 Am. Dec. 552. But see Daly v. James, 8 Wheat. 495, 5 L. Ed. 670. It may sometimes be exercised under the direction of a court of equity after the death of the donee of the power. See Faulkner v. Davis, 18 Grat. (Va.) 651, 98 Am. Dec. 698.

² Machir v. Funk, 90 Va. 289, 18 S. E. 197; Loomis v. McClintock, 10 Watts (Pa.) 274; Booraem v. Wells, 19 N. J. Eq. 87; Want v. Stallibrass, L. R. 8 Exch. 175. Thus, where a husband by his will gives land to his wife until she marries again, and in the event of her remarriage gives his executor power to sell the land, the exercise of the power by the executor, the testator's widow remaining unmarried, is ineffectual and void. Raper v. Sanders, 21 Grat. (Va.) 60.

not be validly exercised in the lifetime of the life tenant, unless all the parties interested are sui juris and consent thereto, and not even then unless this is consistent with the substantial purpose of the donor of the power.³ But if the power given be to sell immediately the remainder or reversion after the life estate (not the land itself), it would seem to be exercisable immediately.

§ 1052. **V. Exercise of the Power Not in Accordance with Its Terms—1. Effect of Failure to Exercise the Power.** If the power is a power in the nature of a trust (or “coupled with a trust”), a failure by the donee to exercise the power is not very material, since the court of equity may itself execute it, or—what amounts to the same thing—may treat it as if it were already executed. The only difference between the court’s execution of such a power and the donee’s arises where the power is in favor of a class of persons, amongst whom the donee has a discretion to select. In such case, while the donee, in exercising the power, may exercise the discretion, and, according to his power, either exclude some members of the class altogether or give them smaller portions than others, the court of equity (upon the donee’s failure to exercise the power) has no such discretion, and must divide the property among all the members of the class in equal shares.⁴

Thus, where land is given by a testator to his wife for her life, with power to appoint it at her death to and amongst his children, as she shall deem best, and she makes no appointment, the property is divided in equity equally among the children, in pursuance of the trust created by the will.⁵

In case of a power to appoint among a class, whether the death of one or more members of the class, prior to the time fixed for

³ 1 Tiffany, Real Prop. § 284; Sugden, Powers, 266; Want v. Stallibrass, L. R. 8 Exch. 175; Jackson v. Ligon, 3 Leigh (Va.) 161; Kilpatrick v. Barron, 125 N. Y. 751, 26 N. E. 925; Booraem v. Wells, 19 N. J. Eq. 87; Do-honey v. Taylor, 79 Ky. 124. The consent of the life tenant alone, even though the time of sale has been postponed solely on his account, is not sufficient, according to the better view. Want v. Stallibrass, L. R. 8 Exch. 175; Jackson v. Ligon, 3 Leigh (Va.) 161; Raper v. Sanders, 21 Grat. (Va.) 60; Davis v. Howcott, 21 N. C. 460. But see Truell v. Tyson, 21 Beav. 439; Snell v. Snell, 38 N. J. Eq. 119; Hamlin v. Thomas, 126 Pa. 20, 17 Atl. 506.

⁴ Ante, §§ 1036, 1046.

⁵ 2 Min. Insts. 821; Harding v. Glyn, 1 Atk. 469, 2 White & Tud. Lead. Cas. Eq. 685, 687, et seq.; Pierson v. Garnett, 2 Bro. Ch. 45; Brown v. Higgs, 8 Ves. 561; Maline v. Keighley, 2 Ves. Sr. 333, 529; Parsons v. Baker, 18 Ves. 476; Morris v. Owen, 2 Call (Va.) 520; Knight v. Yarbrough, Gilmer (Va.) 27; Mitchell v. Johnson, 6 Leigh (Va.) 461; Milhollen v. Rice, 13 W. Va. 510, 564; Tomlinson v. Nickell, 24 W. Va. 148.

the appointment, divests his interest in case of the ultimate failure to appoint, or whether the interest of each member of the class is so vested in him that, upon his premature death, his share will in equity go to his heirs or devisees, seems to turn, as we have seen, upon the question whether the property is by the original instrument expressly and directly given to the whole class, with power in the donee only to name in what shares and in what manner the members are to take, or whether the general power is given the donee to appoint to and among the class, nothing to be given to the class itself directly.⁶

In the last case, the interest does not vest in any particular member of the class until either he is selected by the donee or the appointment is thrown into equity by the donee's failure to appoint. Hence, upon the death of a member of the class before one or the other of these two events, his interest will not go to his heirs or devisees.⁷

But in the first case mentioned, the land being given by the original instrument to the whole class, each member takes a vested interest immediately, which, though subject to be divested in whole or in part by the subsequent exercise of the power by the donee, is good and valid unless and until it be so divested. Hence, in this case, upon the death of a member of the class and the ultimate failure of the donee to exercise the power, the court of equity, in enforcing the trust, will give the heirs or devisees of the deceased member their ancestor's equal portion.⁸

Thus, in *Lambert v. Thwaites*,⁹ where the property was given to A. for life, and after his death to all A.'s children, to be divided among them in such shares as A. should declare by will, and A. did not exercise the power, it was held that the surviving children, and also the devisees of a deceased child, were all entitled in equity to share in the property.

If the power be not in the nature of a trust, that is, if its execution be not imperative or mandatory, but optional with the donee, and he fails to exercise it, the ultimate destination of the property will depend upon whether there are limitations over in default of appointment. If there are such limitations over, the beneficiaries named therein are of course entitled to the property according to

⁶ Ante, § 1046.

⁷ Ante, § 1046; *Lambert v. Thwaites*, L. R. 2 Eq. 151; *Kennedy v. Kingston*, 2 Jac. & W. 431; *Walsh v. Wallinger*, 2 Russ. & M. 78.

⁸ Ante, § 1046; *Lambert v. Thwaites*, L. R. 2 Eq. 151; *Casterton v. Sutherland*, 9 Ves. 445; *Wilson v. Duguid*, 24 Ch. Div. 244; *Rhett v. Mason*, 18 Grat. (Va.) 541.

⁹ L. R. 2 Eq. 151.

the terms of the limitations over. But if there is no ulterior disposition of the property in the event of a failure to appoint, as where land is devised to L. for life and then to such uses as she shall appoint, and L. makes no appointment, the land results to the heir or residuary devisees of the donor of the power.¹⁰

§ 1053. **Same—2. Excessive Exercise of the Power.** An excessive exercise of a power, that is, an exercise which goes beyond the authority of the donee or the scope of the power, can occur only in case of special powers, since the very essence of a general power is that it is unrestricted and unlimited in its scope.¹¹

Any restriction imposed upon the donee in respect to the exercise of the power makes the power to that extent a special power. Such powers, as we have seen, may be restricted in point of (1) the appointees; (2) the interests or estates to be created; (3) the conditions and purposes of the execution.¹²

If the donee exceed his authority by appointing to persons none of whom are objects of the power, the power is badly executed, and the exercise is simply void: but if the donee combines among the appointees persons who are, as well as those who are not, objects of the power, it will be valid as to the former, if the shares intended for them can be ascertained.¹³ Thus, where a power to appoint among members of a class was exercised by appointing life estates to the members of the class, with remainders to their children, the appointments for life were regarded as valid, while the remainders were divided among the members of the class.¹⁴

When the execution is excessive in point of estate or interest created by the appointment, the general rule is that, while the execution is totally void at law, it will be upheld in equity, save as to the excess. Thus, where a donee, who is given power to appoint for life (or for years), appoints in fee (or for a greater number of years), the appointment will in equity be void as to the excess only.¹⁵

¹⁰ 2 Min. Insts. 821; 2 Th. Co. Lit. 579 et seq.; Clive's Case, 6 Co. 180; *Frazier v. Frazier*, 2 Leigh (Va.) 642, 649.

¹¹ Ante, § 1035.

¹² Ante, § 1035 et seq.

¹³ 1 Tiffany, Real Prop. § 286; *Alexander v. Alexander*, 2 Ves. Sr. 640; *In re Brown's Trusts*, L. R. 1 Eq. 74; *Sadler v. Pratt*, 5 Sim. 632; *Horwitz v. Norris*, 49 Pa. 213; *Cruse v. McKee*, 2 Head. (Tenn.) 1, 73 Am. Dec. 186. But see *Varrell v. Wendell*, 20 N. H. 431; *Myers v. Safe-Deposit & Trust Co.*, 73 Md. 413, 21 Atl. 58; *Little v. Bennett*, 58 N. C. 156.

¹⁴ *Horwitz v. Norris*, 49 Pa. 213.

¹⁵ 2 Min. Insts. 820; 1 Tiffany, Real Prop. § 286; *Sugden, Powers*, 519, 521; *Campbell v. Leach*, AmbL. 740.

If the execution is excessive in point of conditions or qualifications imposed by the donee upon the interests of the appointees, as by postponing the time of vesting, or requiring the appointees to pay money, etc., such conditions or qualifications will be rejected, if separable from the exercise of the power, and the appointment will be sustained free from them.¹⁶

§ 1054. **Same—3. Defective Exercise of Power—Aided in Equity.** Except in the case of a power in the nature of a trust, equity does not attempt to relieve against the nonexecution of powers;¹⁷ but against a defective execution thereof, which renders the appointment bad at law, equity will sometimes give relief in favor of one having an equity superior to the holder of the title by compelling the party entitled in default of appointment to convey a good title to the appointee.¹⁸

Such relief will be given only in favor of (1) appointees who have paid a valuable consideration, such as purchasers, lessees, or creditors of the donee;¹⁹ or (2) where there is a meritorious consideration of love and affection, existing between the donee and appointee, by reason of which the donee is bound to make provision for the appointee, as where the appointee is the wife or legitimate child of the donee (rarely in other cases);²⁰ or (3) in favor of a charity.²¹

Aside from a fraudulent exercise of a power (which will be considered in the following section), the defects in the execution of a power which will be aided in a court of equity are defects of form only, not of substance.²²

Thus, where the instrument creating the power calls for an appointment by an instrument under seal, and the seal is omitted,

¹⁶ 1 Tiffany, Real Prop. § 286; Sugden, Powers, 515, 526; Sadler v. Pratt, 5 Sim. 632; Pepper's Appeal, 120 Pa. 235, 13 Atl. 929, 6 Am. St. Rep. 702.

¹⁷ Ante, § 1046.

¹⁸ 2 Min. Insts. 822; 1 Tiffany, Real Prop. § 287. See Atwood v. Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748; Thrasher v. Ballard, 35 W. Va. 524, 14 S. E. 232.

¹⁹ 2 Min. Insts. 822; 1 Tiffany, Real Prop. § 287; Sugden, Powers, 533; Williams, Real Prop. 298; Tollet v. Tollet, 2 P. Wms. 489, 1 White & Tud. Lead. Cas. Eq. 227, notes; Mutual Life Ins. Co. v. Everett, 40 N. J. Eq. 345, 3 Atl. 126; Howard v. Carpenter, 11 Md. 259; Beatty v. Clark, 20 Cal. 11.

²⁰ 2 Min. Insts. 822; 1 Tiffany, Real Prop. § 287; Sugden, Powers, 534; Fothergill v. Fothergill, 1 Eq. Cas. Abr. 222, pl. 9; Morse v. Martin, 34 Beav. 500; Porter v. Turner, 3 Serg. & R. (Pa.) 108.

²¹ 1 Tiffany, Real Prop. § 287; Sugden, Powers, 534; Sayer v. Sayer, 7 Hare, 377; Piggot v. Penrice, Finch, Prec. Ch. 471.

²² 2 Min. Insts. 822; 1 Tiffany, Real Prop. § 287.

equity will cure the defect;²³ and so, also, where the appointment is made by an instrument having less than the number of witnesses prescribed by the instrument creating the power.²⁴

So, also, if a power, which should have been executed by deed, is exercised by will, equity will relieve.²⁵ But if the power is required to be executed by will, it cannot in general be exercised by deed; for that would be contrary to the intention of the creator of the power, which is to have the donee reserve entire control over its exercise until his death, an intention which would be defeated by any other than a testamentary instrument.²⁶

In equity, even a covenant or agreement to execute a power, if supported by a valuable consideration, and within the statute of frauds, is regarded as equivalent to an exercise thereof.²⁷

It is said that equity will relieve, also, against a defective execution of a power, where there is any fraud or surprise (accompanied with fraud), or where the donee is prevented by accident or disability from fully exercising his power.²⁸

But it will not in general relieve against the defective execution of a statutory power, for that would defeat the statutory requirements as to the mode of execution.²⁹

§ 1055. Same—4. Fraudulent Exercise of Power. The donee of a general power, since he is absolutely unrestricted as to the purposes for which he may exercise it, can never be guilty of a fraud upon the power. But the donee of a special power is usually given the power for some particular purposes or reasons, and if he exercises it in a particular way for some ulterior purpose or

²³ *Smith v. Ashton*, 1 Ch. Cas. 263; *Freeman v. Eacho*, 79 Va. 43.

²⁴ 2 Min. Insts. 822; 1 *Tiffany*, Real Prop. § 287; *Wilkes v. Holmes*, 9 Mod. 485.

²⁵ 2 Min. Insts. 822; 2 Th. Co. Lit. 593, note (B); 1 *Tiffany*, Real Prop. § 287; *Sugden*, Powers, 558; *Tollet v. Tollet*, 2 P. Wms. 489, 1 *White & Tud.* Lead. Cas. Eq. 227; *Sneed v. Sneed*, Ambl. 64, Cowp. 264. But see *Williamson v. Beckham*, 8 Leigh (Va.) 27, 28.

²⁶ 2 Min. Insts. 822; *Reid v. Shergold*, 10 Ves. 380; *Richards v. Chambers*, 10 Ves. 586; *Lee v. Muggeridge*, 1 Ves. & B. 118; *Scott v. Davis*, 4 My. & Cr. 90; *Williamson v. Beckham*, 8 Leigh (Va.) 25 et seq.; *Gaskins v. Finks*, 90 Va. 384, 19 S. E. 166; *Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. (N. Y.) 114; *Ewing v. Smith*, 3 Dessaus. (S. C.) 417, 5 Am. Dec. 557.

²⁷ 1 *Tiffany*, Real Prop. § 287; *Sugden*, Powers, 550; *Clifford v. Burlington*, 2 Vern. 379; *Fothergill v. Fothergill*, 1 Eq. Cas. Abr. 222, pl. 9; *Shannon v. Bradstreet*, 1 Sch. & Lefr. 52; *Blore v. Sutton*, 3 Meriv. 237; *Howard v. Carpenter*, 11 Md. 259. See *Johnson v. Touchet*, 37 L. J. Ch. 25.

²⁸ 2 Min. Insts. 822.

²⁹ 1 *Tiffany*, Real Prop. § 287; *McBryde v. Wilkinson*, 29 Ala. 662; *Smith v. Bowes*, 38 Md. 463.

reason of his own, not within the contemplation of the donor of the power, as for his own pecuniary profit where this is not contemplated, this constitutes a fraudulent execution against which equity will relieve in favor of those defrauded thereby.³⁰

Thus, it is a fraud upon the power for a father having a power of appointment among his children to appoint to a child in bad health and likely to die, in order that he himself may inherit;³¹ or for a father to appoint to a son in order that he may act as bail for the father.³²

But where there is no design of ulterior profit to the donee, not contemplated in the original creation of the power, an appointment made because of mere prejudice in favor of or against certain members of the class is not a fraud upon the power, and cannot be set aside.³³

§ 1056. VI. The Extinction or Suspension of Powers—Discussion Outlined. Powers may be extinguished, or at least suspended, in five cases: (1) Where the power has been finally and fully exercised, so that the entire interest to be appointed has been vested in appointees; (2) where the purposes for which the power is to be exercised have ceased to exist; (3) where a condition precedent to the exercise of the power fails of occurrence; (4) where the donee of the power is estopped to exercise it because its exercise would work a fraud upon innocent parties; and (5) where the power is released by the donee.

§ 1057. Same—1. Final and Complete Exercise of the Power. The execution of a power in its entirety may be accomplished by a single act, or it may be capable of accomplishment by several successive, but partial, acts, as where the donee of a general power appoints an estate for life at one time, and a fee simple at another.³⁴

But in any event, so soon as the entire interest in the whole property subject to the power has been given out to appointees,

³⁰ 2 Min. Insts. 822; 1 Tiffany, Real Prop. § 289; Duke of Portland v. Topham, 11 H. L. Cas. 32; Trout v. Pratt, 106 Va. 441, 56 S. E. 165, 8 L. R. A. (N. S.) 398; Stocker v. Foster, 178 Mass. 591, 60 N. E. 407; Thomson v. Norris, 20 N. Eq. 489; Degman v. Degman, 98 Ky. 717, 34 S. W. 523; Holt v. Hogan, 58 N. C. 82.

³¹ Wellesley v. Mornington, 2 Kay & J. 143.

³² Bostick v. Winton, 1 Sneed (Tenn.) 524.

³³ 1 Tiffany, Real Prop. § 289; Topham v. Duke of Portland, 5 Ch. App. 57. See Hill v. Jones, 65 Ala. 214; Hamilton v. Mound City Mut. Life Ins. Co., 6 Lea (Tenn.) 402.

³⁴ Sugden, Powers, 272.

the power is thenceforth extinguished for want of an interest upon which to operate.³⁵

§ 1058. **Same—2. Cessation of Purposes for Which Power was Created.** If the purposes for which the power was created cease to exist, the power ceases to exist also. Thus, in case of a power to sell for purposes of division, if the persons entitled agree to a division without sale, the power of sale is extinguished.³⁶

So, also, in the case of a power to sell in order to obtain funds for the use or support of a particular person, the power ceases upon the death of such person.³⁷ And so a power of sale given to a trustee will cease with the termination of the trust, unless a contrary intention appear.³⁸ But a power conferred upon a fiduciary, not in his fiduciary, but in a personal, capacity, is not extinguished because of the subsequent resignation or refusal of the fiduciary to qualify as such.³⁹

§ 1059. **Same—3. Failure of Condition Precedent to the Exercise of the Power.** This cause of the extinguishment of powers has already been considered,⁴⁰ and it is unnecessary to repeat or enlarge upon that discussion. An illustration of the principle arises where a power is dependent for its exercise upon the previously obtained assent of a third person, and such person dies without having assented.⁴¹

§ 1060. **Same—4. Donee Estopped to Exercise the Power.** When the donee of a power, by his own acts in connection with the land to which the power applies, has placed innocent third parties in a position to be injured or defrauded by his exercise of the power, the power is thereby extinguished, or at least suspended until the danger of such injury be past.

Such a case occurs where the power is coupled with an interest or estate in the land, and the power is to be exercised during

³⁵ 1 Tiffany, Real Prop. § 291; *Ex parte Elliott*, 5 Whart. (Pa.) 524, 34 Am. Dec. 572; *Asay v. Hoover*, 5 Pa. 21, 45 Am. Dec. 713; *Fritsch v. Klausling*, 13 S. W. 241, 11 Ky. Law Rep. 788.

³⁶ 1 Tiffany, Real Prop. § 291; *Chasy v. Gowdy*, 43 N. J. Eq. 95, 9 Atl. 580; *Wooster v. Cooper*, 59 N. J. Eq. 204, 45 Atl. 381. See *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650.

³⁷ *Fidler v. Lash*, 125 Pa. 87, 17 Atl. 240; *Jackson v. Jansen*, 6 Johns. (N. Y.) 73; *Ward v. Barrows*, 2 Ohio St. 241.

³⁸ *Heard v. Read*, 171 Mass. 374, 50 N. E. 638; *Bakewell v. Ogden*, 2 Bush. (Ky.) 265.

³⁹ *Trout v. Pratt*, 106 Va. 431, 56 S. E. 165, 8 L. R. A. (N. S.) 398.

⁴⁰ Ante, § 1038.

⁴¹ 1 Tiffany, Real Prop. § 291; *Sugden, Powers*, 252; *Kissam v. Dierkes*, 49 N. Y. 602; *Peirsol v. Roop*, 56 N. J. Eq. 739, 40 Atl. 121; *Powles v. Jordan*, 62 Md. 499. But see *Leeds v. Wakefield*, 10 Gray (Mass.) 514.

the continuance of the donee's estate or interest. In such case the power is denominated a power "appendant" or "appurtenant," because it is annexed to the estate in the land. Here the donee has his choice, in aliening the land, whether he shall aliene by virtue of his ownership (to the extent of his interest), or whether he shall aliene by virtue of the power conferred upon him. If he chooses to aliene his interest (by virtue of his ownership), his right to exercise the power in favor of another is extinguished or suspended during the continuance of the estate first transferred by him, since otherwise the prior alienees would be deprived of their interest by the subsequent exercise of the power, which would constitute a fraud upon them.⁴²

Thus, if a tenant in fee has power to appoint to others in fee, or a tenant for life has power to grant leases in possession, or to place a rent charge or mortgage upon the land, an alienation of his estate or part thereof by the donee will generally extinguish or suspend the power, so that he cannot thereafter, in derogation of his grant to the alienees, exercise the power.⁴³

But such extinguishment or suspension, it will be observed, takes place only in case the exercise of the power is in derogation of the donee's previous grant of an interest issuing out of his own estate in the land. Hence one who has a life estate, with power to appoint the fee, though he alienes his life estate, may thereafter appoint in fee, if he reserved this right in his conveyance, or if the assignee of his life estate assents thereto.⁴⁴

So, also, if the power, though coupled with an interest or estate in the land, is to be exercised, or the appointment is to take effect, only after the termination of the donee's estate, or of the interest conveyed by him, his alienation of his estate or part thereof does not extinguish nor suspend the power, since in no event can it take effect in derogation of the preceding grant.

Thus the power is not extinguished by the donee's alienation of his interest, where the donee is tenant for life, with power to appoint to his children after his death,⁴⁵ or with power to make a lease for thirty-one years to commence after his death, in or-

⁴² 2 Min. Insts. 816; 1 Tiffany, Real Prop. § 291; Sugden, Powers, 46, 51, 57.

⁴³ 2 Min. Insts. 816; 2 Th. Co. Lit. 124, note (Q, 3); Grange v. Tining, Bridg. Judg'ts, 115; Armstrong v. Kerns, 61 Md. 364; Brown v. Renshaw, 57 Md. 67.

⁴⁴ 1 Tiffany, Real Prop. § 291; Alexander v. Mills, 6 Ch. App. 124; Hardaker v. Moorhouse, 26 Ch. Div. 417; Leggett v. Doremus, 25 N. J. Eq. 122.

⁴⁵ Sugden, Powers, 46, 79; West v. Berney, 1 Russ. & M. 431.

der to raise portions for children, or to provide a jointure for his wife, after his death.⁴⁶

In such cases the estate created under the power cannot, in any event, affect the estate of the donee of the power, and so the power is said to be in gross, as having no connection with the estate (in contradistinction to powers "appendant" or "appurtenant").⁴⁷

In respect to powers in gross, it may be observed that if a tenant for life or years, with power of appointment thereafter by bargain and sale, disposes of the land in fee simple, the power is not thereby extinguished; for since the execution of the power is to take effect beyond the compass of his own estate only, his conveyance, which passes no more than he is entitled to convey,⁴⁸ does not hinder the main use of the power.⁴⁹

It was otherwise, however, at common law, in case of a tortious conveyance (fine, recovery, or feoffment with livery) by the tenant, for the entire fee simple is thereby *prima facie* passed, and all the remainders are *prima facie* divested, and thus the power is destroyed, since it cannot be executed but out of the remainders, and the donee has prevented the execution of it by having already disposed of the whole interest to another.⁵⁰

A fortiori, there is no extinguishment nor suspension of a power, if it be a "naked" power, not coupled with any estate or interest in the land on the donee's part, since the donee has no interest to transfer, and hence cannot place alienees in a position to be defrauded. Such a power, in contrast with a power *appendant* or *appurtenant*, on the one side, and with a power in gross, on the other, is termed a power "simply collateral," and cannot be extinguished or suspended by any act on the part of the donee with respect to the land.⁵¹

§ 1061. **Same—5. Release of Powers.** A power in the nature of a trust cannot be released, by the donee thereof, save perhaps to the beneficiaries or members of the class amongst whom the appointment is to be made, nor can powers simply collateral be

⁴⁶ 2 Min. Insts. 816.

⁴⁷ 2 Min. Insts. 816. Such powers are also sometimes called "collateral" powers, but the student would do well to eschew the latter phrase, lest he be thereby led to confound such a power as this with a power "simply collateral," presently to be mentioned. 2 Min. Insts. 816.

⁴⁸ Ante, § 196.

⁴⁹ 2 Min. Insts. 816; Gilbert, Uses, 315.

⁵⁰ 2 Min. Insts. 817; Gilbert, Uses, 316.

⁵¹ 2 Min. Insts. 817; Gilbert, Uses, 316, 317; Sugden, Powers, 49; West v. Berney, 1 Russ. & M. 431.

released at common law, except when the power is for the benefit of the donee himself, such as a power to charge the land with a debt for his own benefit.⁵²

Save in these cases, the general rule of the common law is that a power may be released by the donee thereof to the remainderman, reversioner or person having an immediate estate of freehold in the land. This applies whether it be a power appendant or appurtenant or a power in gross.⁵³

A release of a power, when validly made, operates by way of extinguishment of the power.⁵⁴

⁵² 1 Tiffany, Real Prop. § 291; Sugden, Powers, 49; West v. Berney, 1 Russ. & M. 431. This is now altered in England by the conveyancing act of 1881 (section 52) which authorizes any donee of a power to release it by deed or contract not to exercise it.

⁵³ 2 Min. Insts. 817; 2 Washburn, Real Prop. 308 et seq.; Sugden, Powers, 82 et seq.; Albany's Case, 1 Co. 110b; West v. Berney, 1 Russ. & M. 431; Smith v. Death, 5 Madd. 371.

⁵⁴ 2 Washburn, Real Prop. 308 et seq. See ante, § 977.

CHAPTER XLII.

TITLE BY ESTOPPEL.

- § 1062. Outline of Discussion.
- 1063. I. Transfer of After-Acquired Title.
- 1064. 1. Transfer by Feoffment, Fine or Recovery.
- 1065. 2. Transfer by Lease.
- 1066. 3. Transfer by Conveyance Containing Covenants or Representations of Title.
- 1067. II. Transfer of Existing Title by Estoppel Arising from Representations.

§ 1062. **Outline of Discussion.** There are two methods in which title to land may pass by estoppel, namely: (1) In case of the transfer of an after-acquired title by estoppel arising from a conveyance of the land made prior to the acquisition thereof by the grantor; (2) in case of the transfer of title by estoppel arising from an oral or written misrepresentation on the part of the owner of land, whereby an innocent purchaser is misled into purchasing a defective title.

§ 1063. **I. Transfer of After-Acquired Title.** When one conveys land to which he, at the time, has no title, but subsequently acquires title thereto, such after-acquired title sometimes enures by estoppel to the grantee.

We shall examine briefly the following instances of the operation of this principle: (1) Where the prior transfer is by feoffment at common law, fine or recovery; (2) where it is by lease; and (3) where it is by a conveyance containing covenants or representations of title.

§ 1064. **Same—1. Transfer by Feoffment, Fine or Recovery.** If a grantor, having no title to land, should nevertheless convey it at common law by a feoffment with livery, or by a fine or common recovery, and should subsequently acquire a title thereto, such feoffment, fine or recovery always operated to transfer to the feoffee, etc., the after-acquired title, provided there was contained therein the "ancient warranty" or covenant real. In such cases, as we have seen,¹ the warranty had not only the ordinary and personal effect of rebutting the claim of the grantor or his heirs to the land under the after-acquired title, by virtue of the estoppel of the warranty, but also the much higher operation of actu-

¹ Ante, § 899.

ally transferring and passing to the grantee the after-acquired estate.²

§ 1065. Same—2. Transfer by Lease. At common law a lease, made by a person who has no estate, or at least no vested estate, in the premises, while it can operate nothing immediately, may operate by estoppel, in case the lessor should afterwards acquire the land. Thus, if an heir apparent, or a contingent remainderman, or one having a contingent interest under an executory devise, or who has no title whatever, makes a lease by indenture, and subsequently an estate in the land vests in him, the indenture will at common law operate by way of estoppel to entitle the lessee to hold the land for the term of years granted him; and this estoppel, when it becomes effectual and can operate on the interest, will be fed by the interest, and the lease will be regarded as a lease carved out of an actual ownership.³

A lease operates by way of estoppel upon the maxim, "*Ut res valeat, magis quam pereat*;" and therefore, if it can operate by way of passing an interest, it shall not operate by estoppel. Hence, where a lessor possessed of an interest leases an estate which may not endure beyond the period of his own interest, though in fact the leased estate does last the longer, a title subsequently acquired by the lessor will not operate by estoppel to keep alive the leased estate; as where A., lessee for the life of B., makes a lease for twenty years by deed indented, and afterwards purchases the reversion in fee, and B. dies, A. shall avoid his own lease, seeing that it takes effect out of A.'s own original interest (which was terminated by B.'s death), and therefore did not operate by estoppel.⁴

§ 1066. Same—3. Transfer by Conveyance Containing Covenants or Representations of Title. At common law the doctrine of title to after-acquired property by estoppel was confined to the four forms of conveyance mentioned in the two preceding sections, and was not applied to such conveyances, as a grant, release or bargain and sale.⁵

² 2 Min. Insts. 710; Rawle, Cov. § 243; 2 Th. Co. Lit. 353, note (B, 1), 456, 457; Doe v. Oliver, 10 Barn. & Cr. 181; Sturgeon v. Wingfield, 15 Mees. & W. 224; Burtners v. Keran, 24 Grat. (Va.) 66.

³ 2 Min. Insts. 767; 2 Th. Co. Lit. 415, note (L); Bac. Abr. Leases (O); Trevivan v. Lawrence, 1 Salk. 276; Doe v. Seaton, 2 Cromp., M. & R. 728.

⁴ 2 Min. Insts. 767, 768; 2 Th. Co. Lit. 416, note (L), 432; Wynn v. Harman, 5 Grat. (Va.) 157.

⁵ Ante, § 899; 2 Min. Insts. 710; Rawle, Cov. §§ 244, 246, 262; Right v. Bucknell, 2 Barn. & Ad. 278; Doe v. Oliver, 5 M. & R. 202, 2 Smith's Lead. Cas. 511, 514, et seq.; Reynolds v. Cook, 83 Va. 821, 3 S. E. 710, 5 Am. St.

But it is generally admitted that if a conveyance of any kind purports to transfer a good title to certain property, whether this appears from recitals, covenants, or in any other manner, there is, in equity at least, a personal estoppel upon the grantor thereafter to deny that such estate has actually passed to the grantee, or to claim the land under a subsequently acquired title as against the grantee, in part to avoid circuity of action, and in part on general equitable grounds of good faith and estoppel.⁶

The distinction between a personal estoppel upon the grantor and an estoppel by which the after-acquired title actually passes seems to be important only where the grantor subsequently conveys the after-acquired title to a third person. In such case, if the estoppel be merely upon the grantor personally, it would not bind such subsequent purchaser of the after-acquired estate, at least, if he be a purchaser for value and without notice of the deed made before the acquisition of the title by the grantor; while if the estoppel operates to pass the after-acquired title itself, it is equally as binding upon a purchaser from the grantor, even, it seems, though for value and without notice, as upon the original grantor.⁷

It should be noted, however, that no estoppel occurs, if the conveyance purports to transfer merely such interest as the grantor owns at the date thereof as in case of a quitclaim deed, and the fact that such conveyance contains covenants for title is immaterial.⁸

It should also be observed that the transfer of after-acquired title by estoppel on the part of a covenantor supposes that he has acquired the subsequent title on his own account and not as a mere trustee, express or indirect, for another. Hence if he buys the subsequent title with another's money, whereby he becomes an im-

Rep. 317. In some of the states, however, such effect is given to these conveyances, especially if they contain certain covenants for title. Rawle, Cov. § 248.

⁶ Ante, § 915; 2 Min. Insts. 710; Rawle, Cov. §§ 245, 255; Bigelow, Estoppel, 395; Goodtitle v. Bailey, Cowp. 601; Right v. Bucknell, 2 Barn. & Ad. 278; Van Rensselaer v. Kearney, 11 How. 297, 13 L. Ed. 703; Flanary v. Kane, 102 Va. 549, 566, 46 S. E. 312, 681.

⁷ Rawle, Cov. § 259; 2 Tiffany, Real Prop. § 456; Bigelow, Estoppel, 413 et seq. See Reynolds v. Cook, 83 Va. 822, 823, 3 S. E. 710, 5 Am. St. Rep. 317; Van Rensselaer v. Kearney, 11 How. 297, 13 L. Ed. 703; French's Lessee v. Spencer, 21 How. 228, 16 L. Ed. 97.

⁸ Rawle, Cov. § 250; Hanrick v. Patrick, 119 U. S. 156, 175, 7 Sup. Ct. 147, 30 L. Ed. 396; Blanchard v. Brooks, 12 Pick. (Mass.) 47; Fay v. Wood, 65 Mich. 390, 32 N. W. 614; Gibson v. Chouteau, 39 Mo. 536; Quivey v. Barker, 37 Cal. 465.

plied trustee for him who advances the consideration,⁹ this would not operate to vest such after-acquired title in his grantee by estoppel.¹⁰

§ 1067. II. Transfer of Existing Title by Estoppel Arising from Representations. It has long been an established and familiar rule in the courts of equity that one who knowingly makes a false representation to another, upon which the latter acts, is bound to make the representation good,¹¹ and also that one's fraudulent failure to make known one's title to a person about to purchase the land from another reverses the ordinary rule of priorities, and postpones the former's claim to that of the purchaser.¹²

Thus, if a person, having title to land, openly disclaims any interest therein, or fails to assert his rights when he should do so, and thereby causes one ignorant of the true state of the title to purchase the land from a third person, he is estopped thereafter—in equity, at least—to assert any claim to the land.¹³ So, also, the true owner may be estopped to set up his title against a person who has expended money for improvements on land under the belief that he has a perfect title to the land, if the true owner rests under an obligation to inform him of the true condition of the title.¹⁴

⁹ Ante, § 421.

¹⁰ 2 Min. Insts. 710, 711; *Gregory v. Peoples*, 80 Va. 357, 358; *Raines v. Walker*, 77 Va. 95. See ante, § 915.

¹¹ *Bigelow, Estoppel*, 557; *Evans v. Bicknell*, 6 Ves. 174.

¹² 2 *Tiffany, Real Prop.* § 457; 2 *Pomeroy, Eq. Jur.* §§ 686, 731. These equitable principles are now, however, generally recognized and enforced in courts of law as well as of equity. 2 *Tiffany, Real Prop.* § 457. See *Pickard v. Sears*, 6 Ad. & El. 469.

¹³ *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618; *Chesapeake & O. R. Co. v. Walker*, 100 Va. 70, 40 S. E. 633, 914; *Coogler v. Rogers*, 25 Fla. 853, 7 South. 391; *Marines v. Goblet*, 31 S. C. 153, 9 S. E. 803, 17 Am. St. Rep. 22; *Guffey v. O'Reiley*, 88 Mo. 418, 57 Am. Rep. 424; *Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340. To constitute an equitable estoppel that will operate to transfer title to property, the party estopped must have been apprised of the true state of his own title, and must have been guilty of fraud, actual or constructive, or of negligence so gross as to imply fraud, and the other party must not only be destitute of all knowledge of the true state of the title, but of any convenient means of acquiring such knowledge, and he must have relied upon the admissions of the party estopped to such an extent as that he will be injured by allowing the truth of them to be disproved. *Chesapeake & O. R. Co. v. Walker*, supra.

¹⁴ 2 *Tiffany, Real Prop.* § 457; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Redmond v. Excelsior Savings Fund & Loan Ass'n*, 194 Pa. 643, 45 Atl. 422, 75 Am. St. Rep. 714; *Dellett v. Kemble*, 23 N. J. Eq. 58; *Gibson v. Herriott*, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17. But the mere failure to assert one's title, without actual misrepresentation in respect there-

In conclusion, it is worthy of observation that an estoppel of this kind is to be distinguished from the sort discussed in the preceding sections by the fact that since this sort is based upon a representation that one has not the title, and not that he has it, it is ineffectual to transfer a title subsequently acquired by the party making the misrepresentation.¹⁵

to, does not operate an estoppel, if the purchaser has notice of the true owner's title by recordation or otherwise. *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 337, 23 L. Ed. 927; *Clark v. Parsons*, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157.

¹⁵ 2 *Tiffany*, Real Prop. § 457; *Gluckauf v. Reed*, 22 Cal. 468; *Donaldson v. Hibner*, 55 Mo. 492.

CHAPTER XLIII.

TITLE BY DEDICATION.

- § 1068. The Nature of Dedication.
- 1069. The Intention to Dedicate.
- 1070. Acceptance of the Dedication.

§ 1068. The Nature of Dedication. Dedication is a form of transfer of land by which an individual grants to the public rights of user in his land, as where one dedicates land to the public use for a highway, park, square, cemetery, school or, in some states, for religious or charitable purposes.¹

A dedication of land to public uses may be made, like any other grant, subject to conditions, reservations or restrictions upon its use by the public. Thus a highway may be dedicated for use at particular seasons, or for certain purposes, only,² or for use by pedestrians alone, or by a certain class of vehicles.³

§ 1069. The Intention to Dedicate. No special form or ceremony is required for a dedication, and the statute of frauds is not applicable thereto, so that neither deed nor writing is necessary to the validity of a dedication to public uses; the only essential, so far as the grantor is concerned, being clear and unequivocal evidence of an intention to dedicate.⁴

Mere acquiescence by the owner in the use of the land by the

¹ 2 Tiffany, Real Prop. § 421; Elliott, Roads and Streets, c. 5; City of Richmond v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877; (parks and squares) City of Cincinnati v. White, 6 Pet. 431, 8 L. Ed. 452; Abbott v. Cottage City, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143; State v. Trask, 6 Vt. 355, 27 Am. Dec. 554; (cemeteries) Hunter v. Trustees of the Village of Sandy Hill, 6 Hill (N. Y.) 407; Mowry v. City of Providence, 10 R. I. 52; Davidson v. Reed, 111 Ill. 167, 53 Am. Rep. 613; (schools) Klinkener v. School Directors of McKeesport, 11 Pa. 444; Board of Education of Incorporated Village of Van Wert v. Inhabitants of Town of Van Wert, 18 Ohio St. 221, 98 Am. Dec. 114; Chapman v. Floyd, 68 Ga. 455; Board of Regents for Normal School Dist. No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938, 10 L. R. A. 493; (charitable and religious purposes) Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 521; City of Hannibal v. Draper, 15 Mo. 634; Williams v. First Presbyterian Society in Cincinnati, 1 Ohio St. 478.

² Mercer v. Woodgate, L. R. 5 Q. B. 26; Hughes v. Bingham, 135 N. Y. 347, 32 N. E. 78, 17 L. R. A. 454; Ayres v. Pennsylvania R. Co., 52 N. J. Law, 405, 20 Atl. 54.

³ Stafford v. Coyney, 7 Barn. & Cr. 257; Trustees of Methodist Episcopal Church of Hoboken v. City of Hoboken, 33 N. J. Law, 13, 97 Am. Dec. 696.

⁴ Lynchburg Traction Co. v. Guill, 107 Va. 86, 57 S. E. 644; Wright v. Tukey, 3 Cush. (Mass.) 290; Hall v. McLeod, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; Godfrey v. Alton, 12 Ill. 29, 52 Am. Dec. 476.

public does not, standing alone, establish the intention to dedicate it permanently to the public use; * but such use, especially if long continued, taken in connection with other circumstances, may raise a presumption of such an intention on the part of the owner.⁶

If the owner of land divides it into lots for sale, intersecting it by streets and alleys regularly laid off upon the ground, this constitutes a dedication of the land so occupied by streets to highway uses.⁷

But if the streets are not actually opened up, but only appear on plats or maps, to which reference is made in the deeds to the lots, it is more questionable whether this amounts to a dedication, independently of statute, though perhaps the weight of authority is in favor of the view that it is at least an inchoate dedication, liable to be abrogated by subsequent events, such as abandonment of the project.⁸

§ 1070. **Acceptance of the Dedication.** Until the dedication is accepted by the public, it is in the nature of a mere offer or license by the owner, which he may withdraw at any time,⁹ and which will impose no responsibility for maintenance or repairs upon the

⁶ Mackey v. Hyde Park, 134 U. S. 84, 10 Sup. Ct. 512, 33 L. Ed. 860; West Point v. Bland, 106 Va. 797, 56 S. E. 802; Hayden v. Stone, 112 Mass. 346; Weiss v. South Bethlehem Borough, 136 Pa. 294, 20 Atl. 801; Lewis v. City of Portland, 25 Or. 133, 35 Pac. 256, 22 L. R. A. 736, 42 Am. St. Rep. 777.

⁷ Buntin v. City of Danville, 93 Va. 200, 204, 24 S. E. 830; Weiss v. South Bethlehem Borough, 136 Pa. 294, 20 Atl. 801; City of Chicago v. Chicago, R. I. & P. Ry. Co., 152 Ill. 561, 38 N. E. 768; New Orleans, J. & G. N. R. Co. v. Moye, 39 Miss. 374. On the other hand, however, the intention to dedicate may be rebutted—in some measure, at least—by proof that the owner has continued to pay taxes upon the land. 2 Tiffany, Real Prop. § 422; Bauman v. Boeckeler, 119 Mo. 189, 24 S. W. 207; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; Rhodes v. Town of Brightwood, 145 Ind. 21, 43 N. E. 942.

⁸ Elliott, Roads and Streets, §§ 117, 118; 2 Tiffany, Real Prop. § 422; Glasgow v. Mathews, 106 Va. 14, 54 S. E. 991; City of Norfolk v. Nottingham, 96 Va. 34, 30 S. E. 444; Irwin v. Dixon, 9 How. 10, 31, 13 L. Ed. 25; Trustees of Methodist Episcopal Church of Hoboken v. City of Hoboken, 33 N. J. Law, 13, 97 Am. Dec. 696; Quicksall v. City of Philadelphia, 177 Pa. 301, 35 Atl. 609; Mayor & City Council of Baltimore v. Frick, 82 Md. 77, 33 Atl. 435.

⁹ See authorities cited in the preceding note. But see *In re Eleventh Avenue*, 81 N. Y. 436; Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186. In such case, the individual purchasers of the lots at least would acquire private rights of way over the streets thus mapped out. 2 Tiffany, Real Prop. § 320.

⁹ Terry v. McClung, 104 Va. 599, 52 S. E. 355; Hayden v. Stone, 112 Mass. 346; Baldwin v. City of Buffalo, 35 N. Y. 375; Price v. Town of Breckenridge, 92 Mo. 378, 5 S. W. 20; Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186; Clendenin v. Maryland Const. Co., 86 Md. 80, 37 Atl. 709.

public authorities,¹⁰ neither of which consequences result if there has been an acceptance.¹¹

This acceptance by the state or municipal authorities may be informal or implied, as well as formal and express, as when the authorities in charge of such matters, without express acceptance, make repairs and improvements.¹² Indeed, after an offer of dedication, acceptance may often be presumed by the jury from mere user by the public, though the authorities take no notice of the offer.¹³

If land be dedicated for particular public uses, and the dedication is accepted, the authorities are bound to use it for such purposes, and their user of the land for other purposes may be restrained in equity upon the application of owners of other land injured by such user,¹⁴ or by the dedicator himself, if he has retained the ultimate ownership of the land in his own hands.¹⁵ But such improper use by the authorities does not terminate the right of the public to use the land in the manner prescribed by the dedicator.¹⁶

In case the use for which the land is dedicated to, and accepted by, the public is abandoned or becomes impossible, the land reverts to the original dedicator or those claiming under him.¹⁷

¹⁰ Elliott, *Roads and Streets*, § 150; *Richmond City v. Gallego Mills Co.*, 102 Va. 165, 45 S. E. 877; *Booraem v. North Hudson County Ry. Co.*, 39 N. J. Eq. 465; *City and County of San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 545; *State v. Atherton*, 16 N. H. 203.

¹¹ *Terry v. McClung*, 104 Va. 599, 52 S. E. 355.

¹² *Richmond City v. Gallego Mills Co.*, 102 Va. 165, 45 S. E. 877; *Wright v. Tukey*, 3 Cush. (Mass.) 290; *Dubois Cemetery Co. v. Griffin*, 165 Pa. 81, 30 Atl. 840; *Folsom v. Town of Underhill*, 36 Vt. 580.

¹³ *Richmond City v. Gallego Mills Co.*, 102 Va. 165, 45 S. E. 877; *Attorney General v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; *Flack v. Village of Green Island*, 122 N. Y. 107, 25 N. E. 267; *New York & L. B. R. Co. v. Borough of South Amboy*, 57 N. J. Law, 252, 30 Atl. 628; *City of Hartford v. New York & N. E. R. Co.*, 59 Conn. 250, 22 Atl. 37; *Parsons v. Trustees of Atlanta University*, 44 Ga. 529.

¹⁴ *2 Tiffany, Real Prop.* § 424; *Gazley v. Huber*, 3 Ohio St. 399; *State v. Travis County*, 85 Tex. 435, 21 S. W. 1029; *Price v. Thompson*, 48 Mo. 363; *Lutterloh v. Town of Cedar Keys*, 15 Fla. 306.

¹⁵ *Hardy v. City of Memphis*, 10 Heisk. (Tenn.) 127; *2 Tiffany, Real Prop.* § 424.

¹⁶ *2 Tiffany, Real Prop.* § 424; *Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477; *Hardy v. City of Memphis*, 10 Heisk. (Tenn.) 127.

¹⁷ *2 Tiffany, Real Prop.* §§ 365, 424; *Glasgow v. Mathews*, 106 Va. 14, 54 S. E. 991; *Mahoning County Com'rs v. Young*, 8 C. C. A. 27, 59 Fed. 96; *Benham v. Potter*, 52 Conn. 248; *Baltimore & O. R. Co. v. Gould*, 67 Md. 60, 8 Atl. 754; *Bayard v. Hargrove*, 45 Ga. 342; *Board of Education of Incorporated Village of Van Wert v. Inhabitants of Town of Van Wert*, 18 Ohio St. 221, 98 Am. Dec. 114; *Heard v. City of Brooklyn*, 60 N. Y. 242.

CHAPTER XLIV.

THE REGISTRY OR RECORDING ACTS.

- § 1071. Origin of the Registry Laws.
- 1072. Purposes of the Registry Laws.
- 1073. Different Kinds of Notice.
- 1074. What Instruments Entitled to Record.
- 1075. Effect of Authorized Record.
 - 1. As Between the Parties.
- 1076. 2. As to Subsequent Purchasers.
- 1077. 3. As to Encumbrancers or Creditors.
- 1078. Of what Facts the Record is Notice.
- 1079. Effect of Unauthorized Record.
- 1080. Effect of a Mistake by the Recording Officer.
- 1081. Of Priority in Recording.

§ 1071. **Origin of the Registry Laws.** The common law does not require any deed or writing in order to pass the title to lands, and of course, therefore, knows nothing of the doctrine of registry. The only notoriety which it demands in such transactions, and the only one compatible with the illiteracy of ancient Anglo-Norman society, is livery of seisin for estates of freehold, and entry for estates for years.¹

The first essay towards the policy of registering conveyances, other than conveyances of record, such as fines and common recoveries, is to be found in the statute of enrollments (27 Hen. VIII, c. 16), which is an appendage to the famous statute of uses (27 Hen. VIII, c. 10). The framers of the statute of uses could not fail to perceive that, by means of its provisions, estates, even of inheritance, in lands might be created and transferred by deed merely, without actual livery of seisin, and, therefore, with a secrecy eminently promotive of fraud, and inconvenient to society; and it was, therefore, enacted by the statute of enrollments, at the same session of Parliament which passed the statute of uses, that conveyances by bargain and sale (which were the more likely to be prostituted to bad ends) should not enure to pass a freehold unless the same were by "writing indented, sealed and enrolled" in one of the courts of Westminster, or else with the *custos rotulorum* of the county, within six months after the date of the writing. Clandestine bargains and sales of terms for years were deemed not worth regarding, such interests, indeed, having been perfectly precarious, and subject to the caprice or good faith of the lord, until

¹Ante, § 138 et seq.

about six years before, when, by statute 21 Henry VIII, c. 15, the termor was protected against those fictitious recoveries whereby previously he was liable to be at any moment divested of his estate.²

The policy thus hesitatingly and imperfectly inaugurated was almost immediately frustrated by the ingenious adaptation of the lease and release to the purpose of conveying the title to lands,³ whereby conveyances might be as secret as could be desired. Nor does Parliament appear to have made any further effort to prevent so mischievous a result until the statute 2 & 3 Anne, c. 4 (A. D. 1704), which, together with several subsequent statutes, provided for a general registry of conveyances in the counties of York and Middlesex; and with so little favor were these attempts regarded that so philosophic an observer as Blackstone, after fifty years' experience, speaks more than doubtfully of the utility of their results. "However plausible," says he, "these provisions may appear in theory, it hath been doubted by very competent judges whether more disputes have not arisen in those counties by the inattention and omission of parties, than prevented by the use of the registers."⁴

In the United States the Legislatures have been far more alive to the advantages of a general registration of all conveyances of, liens on, and transactions affecting lands, and the system has been gradually perfected, until it is believed there is little touching the title to lands which it concerns a purchaser or creditor to know which is not required to be set down in the registry of the county or corporation where the land is, and that registry is made so convenient of access that for one to be deceived argues, in general, a negligence so gross as to exclude sympathy for the sufferer.⁵

There are many ways in which registration may be made to affect the title to land with which we are not here concerned. For example, the record of a judgment, of a mechanic's lien, or of a *lis pendens*, in those states which have substituted a statutory recorded notice of *lis pendens* for the old doctrine of imputed notice,

² 2 Min. Insts. 938; 2 Bl. Com. 338; Bac. Abr. Barg. & Sale (E).

³ Ante, § 1000; 2 Min. Insts. 810, 938.

⁴ 2 Min. Insts. 938; 2 Bl. Com. 343.

⁵ In some ways the public records cannot be relied on to disclose the state of a title. Births, marriages, and deaths affect titles; yet even in those states which require a record of these events, the place of the event determines the place of record. So, also, a disseisor may acquire the ownership of land by adverse possession; but there is no way in which he can make his title a matter of record under the recording acts. It is true that the title can be made matter of judicial record by means of a bill in equity against the former owner to remove a cloud from the complainant's title.

must be carefully looked for by the title searcher. But in these and other like cases the record not only gives the notice to the world, but itself creates—or, at least, marks the inception of—the lien or other change in the title. We are here concerned only with the recordation of those transactions, such as conveyances, mortgages, leases, powers of attorney and executory contracts to convey, as are, in general, perfectly good as between the parties thereto in the absence of any record.

§ 1072. Purposes of the Registry Laws. The registry laws, or “recording acts,” with which we are here concerned, provide for the making and keeping of a public record of certain instruments affecting the title to land. The purpose of this record is not to furnish proof of the state of the title, or even of the transaction set forth in a recorded instrument, but to give to every person proposing to acquire by purchase an interest in land which has already been conveyed, bargained away, encumbered, or leased by the person from whom such interest is to be acquired, or his privy, notice of such prior conveyance, contract, encumbrance, or lease.

In considering the subjects of Trusts and Mortgages it was explained how the application of the doctrine of “bona fide purchaser” would operate in certain cases to displace a claim to or interest in land, whether legal or equitable, in favor of a subsequent purchaser or encumbrancer of the land, who acquired his interest in good faith, for a valuable consideration and without notice of the prior claim. The recording acts are intended to prevent the injustice which must be done to somebody under the very necessary bona fide purchaser rule, by making the record of the instrument creating the prior claim constructive notice of the existence of such instrument to all subsequent purchasers. A purchaser or mortgagee of land, therefore, has only himself to blame if he neglects the opportunity which the law offers him of giving this constructive notice, and no injustice is done him where the law treats the instrument under which he claims as void as against a subsequent purchaser of the same property who took without notice of his prior right.⁶

§ 1073. Different Kinds of Notice. The notice of a prior conveyance which may be brought home to a subsequent grantee, so as to prevent him as a bona fide purchaser from displacing the prior conveyance, is of three kinds: Actual; implied; and con-

⁶ In connection with the general statement in the text concerning the beneficent purpose of the recording acts, the student should read what is said post, § 1081, about the anomalous acts in some of the states, which are so framed as actually to defeat their own object.

structive. They all have the same effect. A subsequent grantee is said to have actual notice of a prior conveyance when he knows of its existence at the time he takes his own conveyance. He has implied notice when he has knowledge of facts which are justly and naturally calculated to excite the suspicion in the mind of a person of ordinary care and prudence that a prior conveyance has been made—a suspicion that would prompt an inquiry which, if made, would lead to the discovery of the prior conveyance.⁷ Constructive notice is that forced upon every purchaser of an interest in land by a conclusive presumption of law, which holds him to have acquired his interest with knowledge of all prior properly recorded conveyances in the chain of title. This statutory constructive notice does not take the place of the other kinds of notice, so that a subsequent grantee could not take advantage of a prior grantee's failure to record his deed, if he took with notice of such prior deed.⁸

§ 1074. What Instruments Entitled to Record. Before going into the effect of the record of a deed or other instrument, it is necessary to inquire what instruments are entitled to record.

In the first place, as the whole matter of registration is the creation of statute, no instrument is entitled to record unless its registration is authorized by statute. Some of the statutes are more liberal than others in this respect. It is believed that most of the statutes are on the same lines as that of New York,⁹ which provides for the registration of every written instrument by which any estate or interest in real property is created, transferred, mortgaged, or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of land, and powers of attorney. While leases are specifically mentioned in most of the recording acts, the statutory term varies from one to five years.¹⁰ Moreover, there are states in which executory contracts and pow-

⁷ Compare, ante, § 951. Thus, the open, notorious possession of land by a grantee under an unrecorded deed is notice to a subsequent grantee of the possessor's title. *Lea v. Polk County Copper Co.*, 21 How. 493, 16 L. Ed 203; *Bright v. Buckman* (C. C.) 39 Fed. 243; *Colby v. Kenniston*, 4 N. H. 262; *Smith v. Yule*, 31 Cal. 184, 89 Am. Dec. 167; *Watrous v. Blair*, 32 Iowa, 63.

⁸ See cases cited *supra*.

⁹ Real Prop. Law, § 240.

¹⁰ *Stimson's Am. Stat. Law*, § 1624. Patents are not generally entitled to the benefit of the recording acts. *Coles v. Berryhill*, 37 Minn. 58, 33 N. W. 213.

ers of attorney are entitled to record and afford constructive notice.¹¹

Secondly, no instrument is ever entitled to record unless it is acknowledged or proved in a manner pointed out by the statute.¹²

§ 1075. Effect of Authorized Record—1. As Between the Parties. The student is reminded that, as between the parties to an instrument conveying or encumbering real property, it is generally true that the recording of the instrument is not necessary to its validity,¹³ that even without record the instrument is perfectly good as between the parties thereto, and that the only result to be obtained by recording the instrument is the notice which is thereby conclusively given to certain persons of the fact that such instrument has been executed and delivered.

§ 1076. Same—2. As to Subsequent Purchasers. Whatever the terms of the recording acts, their effect is to render every instrument which is required to be recorded absolutely void as against certain persons until and unless recorded. The persons in whose favor such unrecorded instrument is held void are the persons protected by these acts; and it is obvious that it behooves every grantee or mortgagee to place his deed promptly on record or run the risk of losing his interest in favor of some person whom he had failed to notify of his deed.

Although there is no difference between the states as to the principle of registration, some acts extend their protection to more classes of persons than others do. But one class of persons is universally protected—subsequent purchasers for a valuable consideration, without notice of a prior unrecorded instrument.

One who takes by descent is obviously not a purchaser, and, otherwise, he would not be entitled to protection against a prior unrecorded deed of his ancestor, for he pays no valuable consideration. But a purchaser from the heir will be protected to the same extent as if he had purchased from the ancestor.¹⁴ A mortgagee is a purchaser within the meaning of the term as used in the recording acts;¹⁵ and so is a trustee under a deed of trust to secure debts.¹⁶

¹¹ In some of these states these instruments are specifically mentioned; in others, the courts have held the general terms of the statutes as broad enough to include them. Webb, Record of Title, §§ 29, 37; 2 Reeves, Real Prop. § 1121.

¹² Post, § 1079.

¹³ Ante, § 926.

¹⁴ Earle v. Fiske, 103 Mass. 491; Blake v. Graham, 6 Ohio St. 580, 67 Am. Dec. 360.

¹⁵ Fargason v. Edrington, 49 Ark. 207, 4 S. W. 763; Weinberg v. Rempe, 15 W. Va. 829.

¹⁶ Wickham v. Lewis, 13 Grat. (Va.) 427; Kesner v. Trigg, 98 U. S. 50.

Subsequent purchasers will not be protected unless they have paid a valuable consideration,¹⁷ which must have been paid before notice is received of the prior deed.¹⁸ It is not necessary that the consideration be money. Marriage is a valuable consideration.¹⁹ As to whether the cancellation of an antecedent debt is a valuable consideration, the authorities differ; but the better opinion seems to be that it is not.²⁰

The notice given by the record of a deed is not to the whole world, but only to those subsequently acquiring an interest from the same source. Thus, while a purchaser of mortgaged land would take with notice of a recorded mortgage, the record of the deed of conveyance would not be notice to the mortgagee.²¹ And while the record of the assignment of a mortgage would be notice to a subsequent assignee thereof, it would not be notice to the mortgagor or his assigns.²² Nor would the record of a deed be notice to a subsequent purchaser from a conflicting claimant, for the two deeds are not in the same chain of title; i. e., the two grantees do not claim from the same source.²³

Once the record is properly made, it is made for all time, and the destruction of the record will not affect the notice, so that a subsequent purchaser, who, by reason of the destruction of the record, has really had no chance to learn of its existence, will be affected by the constructive notice to the same extent as if the record had not been destroyed.²⁴

25 L. Ed. 83. It is otherwise of an assignee in insolvency to pay creditors, for in his case the necessary valuable consideration is absent, and such assignee takes the property subject to all the equities to which it was subject in the hands of the assignor, although he had no notice of them. *Sere v. Pitot*, 6 Cranch, 332, 3 L. Ed. 240; *Brownell v. Curtis*, 10 Paige (N. Y.) 210; *Van Keuren v. McLaughlin*, 21 N. J. Eq. 163.

¹⁷ 2 Pom. Eq. Jur. § 747; *Snowden v. Tyler*, 21 Neb. 199, 31 N. W. 661; *Frey v. Clifford*, 44 Cal. 335; *Worthy v. Caddell*, 76 N. C. 82.

¹⁸ *Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463; *Dresser v. Missouri & I. R. Const. Co.*, 93 U. S. 92, 23 L. Ed. 815. A mere recital of payment in the subsequent conveyance is not enough. *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 248.

¹⁹ *Lionberger v. Baker*, 88 Mo. 447.

²⁰ *Webb*, Record of Title, § 207, where a large number of authorities are collated on both sides of the proposition.

²¹ *Wethersbee v. Farrar*, 97 N. C. 106, 1 S. E. 616; *First Nat. Bank v. Honeyman*, 6 Dak. 275, 42 N. W. 771.

²² *Mitchell v. Burnham*, 44 Me. 302; *Jones*, Mortgages, § 473.

²³ *Kerfoot v. Cronin*, 105 Ill. 609; *Traphagen v. Irwin*, 18 Neb. 195, 24 N. W. 684; *Straight v. Harris*, 14 Wis. 509. As to the effect of a disseisor's recorded deed as notice to a subsequent grantee of the disseisee, see *Wade*, Notice, § 205.

²⁴ *Armentrout v. Gibbons*, 30 Grat. (Va.) 632; *Shannon v. Hall*, 72 Ill. 354, 22 Am. Rep. 146.

§ 1077. **Same—2. As to Encumbrancers and Creditors.** Most of the recording acts specify the creditors of a grantor as entitled to protection, along with subsequent purchasers, as against a prior unrecorded deed. As a general thing, the word "creditors," in this connection, is construed to mean only those creditors who, before the record of the prior deed, obtain some lien upon the land, by reason of the nature of the debt, or by judgment, levy of execution or attachment, or otherwise.²⁵ But in Virginia, West Virginia, and Tennessee, the term includes general creditors, and the same is true in those few states in which the record of a deed is requisite to its validity as between the parties.²⁶

§ 1078. **Of What Facts the Record is Notice.** The proper record of an instrument is constructive notice of every fact affecting the title which is therein recited, or which is alluded to in such way as to put a reasonably prudent man upon an inquiry which, if instituted, would have resulted in bringing the fact to light and of the existence and terms of every instrument (although unrecorded) which is recited, and of all matter of law which results from the terms of the instrument. Thus the record of a mortgage with power of sale puts a subsequent purchaser upon notice of an execution of the power, although the latter does not appear on the record.²⁷ So, if a deed appeared on its face to be executed in fraud of a trust, the record would be notice of the fraud, and a purchaser under the deed would take accordingly.²⁸ So one who buys land under a recorded deed must take notice of whatever covenants it contains that run with the land.²⁹

It is important to note, however, that record is not notice of facts outside of the subsequent purchaser's chain of title.³⁰ Sup-

²⁵ *Stevenson v. Texas & P. R. Co.*, 105 U. S. 703, 26 L. Ed. 1215. The student is here reminded that at common law a judgment does not operate as a lien on real property belonging to the judgment debtor, and that one who furnishes labor or materials for the improvement of land acquires at common law, no lien on the land analogous to liens given by the common law to certain bailees of chattels. All such liens upon land are of statutory creation.

²⁶ *Webb*, Record of Title, § 196.

²⁷ *Heaton v. Prather*, 84 Ill. 330. See *Hamilton v. Nutt*, 34 Conn. 501; *Viele v. Judson*, 82 N. Y. 32; *Tripe v. Marcy*, 39 N. H. 439; *Webb*, Record of Title, § 176 et seq.

²⁸ *McPherson v. Rollins*, 107 N. Y. 317, 14 N. E. 411, 1 Am. St. Rep. 826. The student is advised to refresh his memory upon the subject of constructive trusts, ante, § 424, et seq.

²⁹ *Schwallback v. Chicago, M. & St. P. Ry. Co.*, 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740.

³⁰ *Webb*, Record of Title, § 180.

pose that A. conveys to B., who fails to put his deed on record. B. then conveys to C., reciting the deed from A. C.'s deed being recorded, a purchaser from him must take notice of the unrecorded deed from A. to B., with its recitals and covenants, for it is in his chain of title. But, under a like state of the record, a subsequent bona fide purchaser from A. would not, by reason of C.'s recorded deed, be obliged to take notice of the prior unrecorded deed from A. to B.

§ 1079. Effect of Unauthorized Record. The mere copying into the record book of an instrument which the statute does not authorize to be recorded has no effect whatever as constructive notice; that is to say, subsequent purchasers and encumbrancers are not bound to take notice of it. A deed that is void for any reason, as for forgery,³¹ or the lack of proper execution,³² or because it was never delivered (where delivery is an essential to validity),³³ is not entitled to record. Moreover, it is a general prerequisite to the registration of any instrument that its execution be acknowledged before some designated officer, whose certificate must show that the statute has been substantially complied with,³⁴ or that the execution be proved by the oath of one of the subscribing witnesses.³⁵

Nevertheless, the unauthorized record of an instrument may furnish actual notice of its existence and contents to one who sees it in examining the records.³⁶

§ 1080. Effect of a Mistake by the Recording Officer. It seems to be the rule everywhere that, when an instrument is properly recorded, the time at which the constructive notice begins is the time when the instrument was filed. But whether the record is only to be considered as made when the instrument is actually registered, the effect thereof as to notice relating back to the time of filing, or, in contemplation of law, the record itself is complete at the time of filing, the courts are not in accord.³⁷ The question in a given state is an important one, for upon its answer will depend

³¹ *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; *Pry v. Pry*, 109 Ill. 466.

³² *Shepherd v. Burkhalter*, 13 Ga. 443, 58 Am. Dec. 523; *Racouillat v. Sansevain*, 32 Cal. 376.

³³ *Edwards v. Thom*, 25 Fla. 222, 5 South. 707.

³⁴ *Coombes v. Thomas*, 57 Tex. 321; *Sharpe v. Orme*, 61 Ala. 263.

³⁵ For a digest of the recording acts of the various states, see *Webb, Record of Title*, § 227 et seq.

³⁶ *Musgrove v. Bonser*, 5 Or. 313, 20 Am. Rep. 737; *Kerns v. Swope*, 2 Watts (Pa.) 75.

³⁷ It should be noted that the fact that in some states the record dates from the filing and in others from the registration is not generally due to

the determination of who must suffer from the mistakes of the recorder. Such mistakes may be made in incorrectly copying the instrument, or in copying it into the wrong book, or even in a total omission to register it.³⁸

Let us suppose the case of a mortgage for \$10,000 executed by A. to B. This mortgage is duly filed for record by B., but the recorder, in copying it, makes the amount of the debt secured read \$1,000. Subsequently A. applies to C. for another loan, offering the same land as security. C. examines the records and finds a prior mortgage for what appears to be \$1,000. Being satisfied with the security offered on the basis of what the record shows, he advances the money and takes a second mortgage, without notice of the true amount of the first mortgage. In the event of a foreclosure and sale, the proceeds being insufficient to pay both mortgages in full, how are the funds to be distributed? If the record of B.'s mortgage dated from the filing, B. did all that the law required of him, and his rights are not impaired by the error of the recorder. He is entitled to be paid the amount of his mortgage in full out of the proceeds of sale. In this case the loss caused by the recorder's mistake will fall on C., although he was not in fault. On the other hand, if the record began with the actual recording, the notice to subsequent purchasers was limited to the facts disclosed, and therefore C. took with notice only of a prior mortgage for \$1,000.³⁹ As to C., B.'s mortgage would be void as security for more than \$1,000, and the funds would be distributed thus: First, B. would be entitled to \$1,000; then C. would be entitled to be paid the full amount of his mortgage; and if there were anything left it would be applied on B.'s mortgage.

In those states where the record is notice of only the facts which appear on the record, it is incumbent on one who files his deed to see to it that the recorder does his work properly; otherwise he will run the risk of seeing a subsequent bona fide purchaser or creditor displace his estate or security.⁴⁰

The latter rule is the one adopted in most of the states, and it would seem to be the sounder and the one better in accord with the principles of equity.⁴¹

But whether the loss occasioned by a mistake in recording fall

any essential differences in the statutes, but to differences of opinion on a question of construction.

³⁸ *Throckmorton v. Price*, 28 Tex. 605, 91 Am. Dec. 334.

³⁹ *Beekman v. Frost*, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246.

⁴⁰ *Barney v. McCarty*, 15 Iowa, 515, 83 Am. Dec. 427; *Succession of Falconer*, 4 Rob. (La.) 7.

⁴¹ See Webb, *Record of Title*, §§ 16, 17, where the authorities on both sides of this question are collated.

on the grantee, under one rule, or on a subsequent purchaser, under the other, the party damaged has a right of action against the recorder on his official bond.⁴²

§ 1081. Of Priority in Recording. When we come to consider the conditions under which the rights of a bona fide purchaser are given by the various recording acts to a subsequent purchaser, we find that the states have ranged themselves into three groups:

First, those states which unconditionally avoid a prior unrecorded deed in favor of a subsequent purchaser for a valuable consideration without notice. In these states, it is not necessary that the subsequent purchaser record his deed in order to gain priority under the act,⁴³ although, obviously, he ought to record it in order to protect himself against a third purchaser.

Second, those states in which the prior deed is avoided in favor of a subsequent purchaser only on condition that the subsequent deed shall be first recorded. Here, although a subsequent purchaser acquire his interest in good faith and without notice of a prior unrecorded deed, if the first purchaser succeed in recording his deed first, he will not be postponed to the second purchaser.⁴⁴ In these states, prudence on the part of a grantee requires that the delivery of a deed and its filing for record be practically simultaneous acts.

Third, those states which give to every grantee a definite time within which he may record his deed without fear of being displaced by a subsequent bona fide purchaser without notice; the record, if it be made within the prescribed time, relating back to the delivery of the deed.⁴⁵ It would seem that the states falling within this class withhold the very protection to give which was the *raison d'être* of the recording acts. In these states, the record of a deed after the prescribed time has the effect of notice, but only from the date of record,⁴⁶ there being no relation back to the date of delivery.

⁴² *Giffen v. Barr*, 60 Vt. 599, 15 Atl. 190; *Fox v. Thibault*, 33 La. Ann. 32; *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714.

⁴³ *Steele v. Spencer*, 1 Pet. 552, 7 L. Ed. 259; *Gardner v. Early*, 72 Iowa, 518, 34 N. W. 311; *Edwards v. Thom*, 25 Fla. 222, 5 South. 707.

⁴⁴ *Fallass v. Pierce*, 30 Wis. 443. In *Webb*, Record of Title, § 13, it is stated that this is the rule by the express terms of the acts in nearly one-third of the states and territories.

⁴⁵ *Phifer v. Barnhart*, 88 N. C. 333; *King v. Fraser*, 23 S. C. 543; *Anderson v. Dugas*, 29 Ga. 440.

⁴⁶ *Anderson v. Dugas*, 29 Ga. 440; *Coster's Ex'rs v. Bank of Georgia*, 24 Ala. 37; *Den ex dem. Read v. Richman*, 13 N. J. Law, 43; *Nice's Appeal*, 54 Pa. 200.

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- to A. and his heirs, and if A. should not leave issue living at his death to B. for life, remainder to C. in fee, 709.
- to A. and his heirs, and if he die without a son living at his death then in fee to first son of B. who reaches 21, and if he has no son then in fee to his first daughter who reaches 21, and if no daughter then to C. in fee, 710.
- to A. and his heirs as long as Z. has heirs, remainder to B. and his heirs, 595.
- to A. and his heirs, but if A. die under 25 (or if B. die leaving no issue at his death, or if A. marry W., etc.), to Z. and his heirs, 680, 681.
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- to A. and the heirs of his body, and if he die leaving no heirs of the body then living, so much as A. shall be possessed of at his death to B., 708.
- to A., B., and C. for their lives, remainder to survivors or survivor, 640.
- to A., B., and C. in fee, and if they die without issue to Z. in fee, 693.
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- to A. for life, and after his death to such of his children as shall become 21, 674.
- to A. for life, and after one year from A.'s death to Z. in fee, 594.
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- to A. for life, and if A. marry W. then to B. in fee, 680.
- to A. for life, and if A. survive B. remainder to A.'s heirs, 627.
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- to A. for life, and if he have a son to such son in fee, and if he have no son to B. in fee, 639.
- to A. for life, and if Z. die before X. remainder to W., 599.
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- to A. for life (or in fee), to commence five years from date, 676.
- to A. for life, remainder after C.'s death to Z. in fee, 594, 597, 602, 636.
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- to A. for life, remainder if B. survive C. to B. for life, remainder to D. in fee (B. dying before C.), 638.

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- to A. for life, remainder to A.'s sons for life, remainder to (unborn) sons of C., 713.
- to A. for life, remainder to A.'s surviving children, 600, 604.
- to A. for life, remainder to A.'s unborn son or child, 604, 636.
- to A. for life, remainder to B., C., and D. (testator's children), and if any of these die before A. his share to go to the survivors, 600.
- to A. for life, remainder to B. for life, remainder to heirs of A., 626.
- to A. for life, remainder to B. for life, remainder to heirs of A. and B.. 625.
- to A. for life, remainder to B. if he live to reach 21, and if he fail to reach 21 then to C., 600.
- to A. for life, remainder to B. if he survive C., 636, 674.
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- to A. for life, remainder to B. in fee, but if B. die during A.'s lifetime B.'s estate to go to his children, 600.
- to A. for life, remainder to B.'s children (or heirs, or brothers, or any designated class of persons), 606, 636.
- to A. for life, remainder to B.'s heirs (or heirs of the body, or issue, etc.), 604, 613, 651.
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- to A. for life, remainder to heirs of A.'s body living at his death, or born within 10 months thereafter, 615.
- to A. for life, remainder to heirs of A. who shall then have reached 21, 615.
- to A. for life, remainder to heirs of body of A. and his wife, 613.
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- to A. for life, remainder to her (unbegotten) bastard child, 648.
- to A. for life, remainder to his eldest son living at A.'s death (A. having no son at time), 604.
- to A. for life, remainder to his eldest son (unborn), 604.
- to A. for life, remainder to his issue, and if he have no issue, or if, in case he have issue, such issue die under 21, then over to B., 692.
- to A. for life, remainder to his issue male and his heirs forever, and if he die without issue male, remainder to B. in fee, 653.
- to A. for life, remainder to his unborn child for life, remainder to eldest son (or issue, etc.) of such unborn child, 171, 646, 647.
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- to A. for life, remainder to such of his children as reach 21, 604.
- to A. for life, remainder to such persons as shall at A.'s death answer the description of A.'s heirs, 615.
- to A. for life, remainder to testator's surviving children, 600.
- to A. for life, remainder to the now living heirs of W., 608.
- to A. for life, remainder to unborn children of Z., 636.
- to A. for life, remainder to Z. for life if he should survive W., remainder to A.'s heirs, 626.
- to A. for life, remainder to Z. in fee, 594.
- to A. for life, remainder to Z.'s eldest son (unborn) in fee, 594.
- to A. for life, remainder to Z.'s heirs, and if A. die, living Z., to W. and his heirs, 595.
- to A. for life, with power to appoint in fee, and in default of appointment to B. in fee, 653.
- to A. for life, with power to sell or use at A.'s discretion and what remains undisposed of at A.'s death to B., 708.
- to A. for 99 years, remainder to Z. for 1 year, 592.
- to A. for 100 years if he shall so long live, and after A.'s death to W. in fee, 603.
- to A. for 10 years, remainder to heirs of B., 674.
- to A. for 3 years, remainder to B. in fee, 592.
- to A. for 21 years if he shall so long live, and after his death to Z. in fee, 602, 603.
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- to A. in fee, but if B. marry C. then to B. for life (B. marrying C.), 691.
- to A. in fee, but if he die leaving issue at his death then to such issue, if he die leaving no issue at his death then to B. in fee, 692.
- to A. in fee, but if he die under 25 to B. in fee (A. never coming into existence, or dying under 25 and before testator), 690.
- to A. in fee, but if he die without heirs, etc., living at his death, to B. in fee, 707.
- to A. in fee, but if he die without heirs, etc., to B. in fee, 707.
- to A. in fee, but if he leaves no son over 25 to B. in fee, 703.
- to A. in fee, but if he shall leave no son who shall reach 25 to B. in fee, 703.
- to A. in fee, but upon failure of A.'s heirs to B. in fee, 702, 705.
- to A. in fee, but upon failure of A.'s heirs, etc., at his death, to B. in fee, 706.
- to A. in fee in trust until B. reaches 21, and if B. should reach 21 or have issue then to B. and the heirs of his body, but if B. die before 21 or without issue remainder to S., 709.
- to A. in fee, to commence 6 months after my death, 713.
- to A.'s children (or brothers, or nephews, or any other designated class of persons), 678.
- to A.'s eldest son (unborn) in fee, but if A. have no son to B. in fee at A.'s death, 692.
- to A.'s eldest son (unborn) in fee, but if he die under 30 to B. in fee, 681.
- to A.'s eldest son (unborn) for life, remainder to his children, 171.

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- to A. (testator's son) for life, remainder to A.'s first and other sons by any future wife in tail, provided that if A. should afterwards marry any one akin to his present wife, M., the foregoing limitations to the issue of such future marriage to cease, and the land to pass to testator's nephews, 654.
- to A. until B. reaches 21, and when B. reaches 21 then to B. and his heirs, 601.
- to A. until he marries Y., then at once to Z., 597.
- to A. until Z. returns from abroad, then to W. in fee, 599, 650.
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- to a grandson (unborn) of testator who shall reach 21, 697.
- to D. for life, and at her death to be equally divided among her children, should any survive her, 597.
- to D. for life, and at her death to be equally divided among her children, should any survive her; if she die without issue, or if her surviving child or children should die before becoming of age, then to be divided among testator's heirs at law according to laws of Virginia, 604, 653.
- to first son of A. who reaches 21, 704.
- to first son of A. who reaches 25, 704.
- to H. and W. during their joint lives, remainder to survivor for life, remainder to first and other sons in tail, remainder to daughters in tail, remainder to heirs of H., 700.
- to L. for life, remainder in fee to children of L. living at L.'s death, 602, 604.
- to my sisters E. and M. until the death of the husband of my sister S., and in case S. should then be living to my three sisters severally for their lives, remainder severally to their first and other sons in tail, remainder over (S. dying in husband's lifetime), 654.
- "to my two daughters and their heirs, equally to be divided between them. and if they die without issue I will give all to my nephew," 642.
- "to my two sons, one part to one and his heirs, and the other part to the other and his heirs; I will that the survivor of them shall be heir to the other, if either die without issue," 642.
- to my wife for life, upon this express condition only, that if she marry again the property to go forthwith to my eldest son in tail, remainder over (the wife dying without marriage again), 656.
- to such children of A. (living) as may be living at a certain period (too remote), 698.
- to such children of A., after A.'s death, as reach 25 (A. dying before testator), 701.
- to such of A.'s children as shall reach 21, 679.
- to such of A.'s sons as shall take holy orders, 704.
- to such of my grandchildren as shall reach 22, 704.
- to such of my grandchildren as reach 21, 704.
- to the child of which my wife is enceinte, and if such child die under 21 then over (the wife not being pregnant), 690.
- to the heirs of A. (who is yet living), 676.
- to the heirs (or heirs of the body, or issue, or unborn child, etc.) of B. (a living person), 679.
- to the surviving children of A. after death of B., 677.
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- to trustees in trust to cause the income to be accumulated during the lives of all my sons and of all my grandsons living at my death or then en ventre sa mère, then to be divided, etc., 716.
- to use of A. for life, and after his death to such uses as Z. shall appoint (Z. appointing to heirs of A), 631.
- to use of feoffor for life, remainders to use of feoffees for 80 years if N. S. and E. S., his wife, so long live, and if E. S. survives N. S. then to her for life, and after her death to B. S. in tail, and in default of issue to E. N., D. S., and F. S., and the heirs of their bodies, remainder to heirs of feoffor, 652.
- to X. and Y. for life, remainder to the survivor, 597, 602, 604.
- to Z. for 10 years, then to W. for life, and after W.'s death to X. in fee, 590.
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